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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

SANDRA BRITTON, ET AL.,

Petitioners,

v.

BAYER CORPORATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BAILEY PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Bailey Petitioners, who were plaintiffs in the district court, received, as due process requires, "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections" (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)) in regard to certain case management orders, the motion to dismiss, and the order of dismissal that disposed of their lawsuit.

PARTIES TO THE PROCEEDING

Petitioners

The Petitioners are Sandra Britton; Yolanda Wright; Marcy Albertoni; Linda Allen; Mike Bailey; Jerome Begay; Benjamin Benemon; Josie Blackwelder; Rickey Brannon; Mike Braxton; Laura L. Burns; Jackson Butler; Bessie Campbell; James Carter; Michael Clark; Edward Cole; Loretta Cook; Mary Sue Couch; Nona Daniels; George Defnall; Musa Doh; Mary Downing; Eddie I. Ellison; Joseph Ester; Carrie Faver; James Fields; Debbie Gaylord; Maybelle George; Michael Hale; Deborah Harris; Constance Harrison, Individually And As Next Friend Of Savana Harrison, Minor; William Harvill; Guindell D. Hogan; Johnnie Huggins; Ronald Hyde; Nathaniel Ivey; Christine Jackson; Gloria Jackson; Judy Marie Jackson; Elizabeth Jinks; Gloria Johnson; Ruby Jones; American Kaylor; Debra Keith; Mary Lott; Terry McAlmont; Don McDaniel; Mary McDonald; William Miller; Mary E. Milligan-Nichols; Peggy Lynn Morris; Roy Wayne Morris; Nancy Murray; William Murtaugh; Rosie Mae Norris; Linda Ordonez; Daniel Otis; Robert Patino; Moises E. Perea; Diana Pharo; Dorothy Pilato; June Rhodes; Craig Riley; Alicia Rivers; Joe Roberson, Individually And As Representative Of The Estate Of Vickie Lynn Roberson, Deceased; Rosa L. Roberts, Individually And As Representative Of The Estate Of Evelyn P. Roberts, Deceased; Linda Guenther, Individually And

PARTIES TO THE PROCEEDING – Continued

As Representative Of The Estate Of Ida Rogue, Deceased; Betty C. Rosemond; Alma Rucker; Daniel Rushton; James A. Scales; Curley Shealey; Leigh Strong; Tirsa Vazquez, Individually And As Representative Of The Estate Of Alex Vazquez, Deceased; John Baines Walker; Pamela Walker; Benjamin Wells; Majoriette Williams; Cassie Elaine Covington Williams; Thomas Willis; Desda Witcher; Clifford Woods; Lois Sutton; Willie Madison; Carl Powers; Toni Walker; Katherine Hutto; Barry Baxter; Eddie LeClair; Beverly Wilson; Alverta Hills; and Others Similarly Situated.

The Petitioners fall into two categories. The Albertoni Petitioners are Marcy Albertoni; Linda Allen; Barry Baxter; Jerome Begay; Rickey Brannon; Mike Braxton; Laura L. Burns; Jackson Butler; Bessie Campbell; James Carter; Cassie Elaine Covington Williams; George Defnall; Mary Downing; Eddie I. Ellison; Joseph Ester; Carrie Faver; James Fields; Debbie Gaylord; Constance Harrison, Individually And As Next Friend Of Savana Harrison, Minor; William Harvill; Guindell D. Hogan; Nathaniel Ivey; Gloria Jackson; Judy Marie Jackson; Elizabeth Jinks; Ruby Jones; Debra Keith; Eddie LeClair; Terry McAlmont; Don McDaniel; William Miller; Nancy Murray; Rosie Mae Norris; Linda Ordonez; Craig Riley; Rosa L. Roberts, Individually And As Representative Of The Estate Of Evelyn P. Roberts, Deceased; Linda Guenther, Individually And As

PARTIES TO THE PROCEEDING – Continued

Representative Of The Estate Of Ida Rogue, Deceased; Alma Rucker; Daniel Rushton; James A. Scales; Curley Shealey; Tirsa Vazquez, Individually And As Representative Of The Estate Of Alex Vazquez, Deceased; Clifford Woods; Alverta Hills; Yolanda Wright; Thomas Willis; and Others Similarly Situated.

The Bailey Petitioners are Sandra Britton; Mike Bailey; Benjamin Benemon; Josie Blackwelder; Michael Clark; Edward Cole; Loretta Cook; Mary Sue Couch; Nona Daniels; Musa Doh; Maybelle George; Michael Hale; Deborah Harris; Johnnie Huggins; Ronald Hyde; Christine Jackson; Gloria Johnson; American Kaylor; Mary Lott; Mary McDonald; Mary E. Milligan-Nichols; Peggy Lynn Morris; Roy Wayne Morris; William Murtaugh; Daniel Otis; Robert Patino; Moises E. Perea; Diana Pharo; Dorothy Pilato; June Rhodes; Alicia Rivers; Joe Roberson, Individually And As Representative Of The Estate Of Vickie Lynn Roberson, Deceased; Betty C. Rosemond; Leigh Strong; John Baines Walker; Benjamin Wells; Majoriette Williams; Beverly Wilson; Desda Witcher; Lois Sutton; Willie Madison; Carl Powers; Toni Walker; Katherine Hutto; Pamela Walker; and Others Similarly Situated.

Respondents

The respondents are Bayer Corporation; Glenbrook Laboratories, A Division Of Sterling Drug,

PARTIES TO THE PROCEEDING – Continued

Inc.; Mead Johnson & Company; Proctor & Gamble Company; Pfizer Inc.; Bristol-Myers Squibb Company; Apothecon Inc.; Hogil Pharmaceutical Corp.; SmithKline Beecham Corporation; Chattem, Inc.; Thompson Medical Company Inc.; Wyeth; Chesebrough-Ponds, Inc.; Warner-Lambert Company, LLC; and Schering-Plough HealthCare Products, Inc.

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The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished and is reported at *In re Phenylpropanolamine (PPA)*, 2008 WL 163041 (9th Cir. 2008).

BASIS FOR JURISDICTION IN THIS COURT

The decision of the United States Court of Appeals for the Ninth Circuit affirming the district court's denial of Federal Rule of Civil Procedure 60(b) relief was entered on January 18, 2008. App. 1. The Bailey Petitioners timely filed petitions for rehearing on February 1, 2008. The United States Court of Appeals for the Ninth Circuit's order denying the petitions for rehearing was entered on February 22, 2008. App. 36.

This petition for writ of certiorari was filed within 90 days of the date the United States Court of Appeals for the Ninth Circuit denied the Bailey Petitioners' timely-filed petitions for rehearing. As such, this petition for writ of certiorari is timely filed under Supreme Court of the United States Rule 13.3.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Civil Procedure 60(b):

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

> . . .
>
> **(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been

discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

STATEMENT OF THE CASE

This case involves the adequacy of notice, for due process purposes, of certain case management orders, a motion to dismiss, and the order of dismissal that disposed of the Bailey Petitioners' lawsuit.

The Bailey Petitioners were plaintiffs in PPA litigation. App. 8. In general, PPA cases are "rooted in complex core questions concerning the safety of Phenylpropanolamine (PPA) – a substance which, until it recently became the subject of a public health advisory issued by the Food and Drug Administration, was used as an ingredient in many nasal decongestants and weight control products." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 173 F.Supp.2d 1377, 1379 (J.P.M.L. 2001).

In 2001, the Judicial Panel on Multi-District Litigation ("JPML") designated the United States District Court for the Western District of Washington (the Honorable Barbara Jacobs Rothstein, presiding) as the transferee court for "coordinated or consolidated pretrial proceedings" in federal PPA cases. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 173 F.Supp.2d at 1380. The JPML stated that "centralization . . . in the Western District of Washington will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." *Id.* at 1379.

In the course of the litigation, the district court entered a series of case management orders (CMOs) addressing administrative, discovery, pleading, remand, and mediation issues. App. 14. In particular, CMO 15 required each plaintiff to plead individually and to designate the specific PPA product he or she ingested. App. 15. CMO 15A provided a procedure for the dismissal of those claims brought by plaintiffs who had failed to timely file new, individual complaints. App. 15, 19.

The Bailey Petitioners were PPA plaintiffs in what has come to be known as "the *Britton* case," which was originally filed in Mississippi by Delano Funches of Funches & Associates. App. 8, 10. Mr. Funches was the Bailey Petitioners' lead attorney in the *Britton* case. App. 10.

But the MDL docket sheet for the *Britton* case showed not Mr. Funches, but Catouche Body as the

lead attorney to be noticed for the Bailey Petitioners. App. 10. Mr. Body also worked at Funches & Associates. App. 10. However, he was never the lead attorney (for notice or any other purpose) for the Bailey Petitioners, and he left Funches & Associates about a year before the *Britton* case was dismissed. App. 10.

Not only did the MDL docket sheet show the wrong attorney as lead counsel for the Bailey Petitioners, it showed the wrong address for the wrong attorney. App. 10. The address it listed for Mr. Body was actually the residence of his grandmother. Furthermore, the docket sheet also stated an incorrect address for Funches & Associates.

CMO 15 listed the *Britton* case as one of many whose plaintiffs were required to comply with the order to plead individually and to designate the specific PPA product ingested. App. 15. But lead counsel for the Bailey Petitioners did not receive CMO 15. Therefore, timely compliance with CMO 15 was impossible.

The district court entered an order dismissing the *Britton* case with prejudice for failure to comply with CMOs 15 and 15A. App. 29, 34. The order was based on the defendants' Second Proposed Order of Dismissal with Prejudice for Cases in Which Plaintiffs Filed Untimely or No Individual Complaints Under CMOs 15 and 15A, which had been filed on December 8, 2003. App. 16-17. But the Bailey

Petitioners' trial counsel never received a copy of the dispositive motion to dismiss.

Nor did the Bailey Petitioners' trial counsel timely receive the order dismissing the *Britton* case for failure to comply with CMOs 15 and 15A. The order dismissing the *Britton* case was entered on May 7, 2004. App. 14. But the Bailey Petitioners' trial counsel did not receive that order until well over a year later.

The law firm of O'Quinn, Laminack & Pirtle ("the O'Quinn Law Firm") was associated with the *Britton* case for the purpose of assisting the plaintiffs with pre-trial litigation matters and with an eye toward trying the case. Each Bailey Petitioner signed a power of attorney authorizing the O'Quinn Law Firm's participation. Still, Mr. Funches remained the lead attorney for the Bailey Petitioners. App. 10. Like Mr. Funches, the O'Quinn Law Firm was unaware of the mailings to Mr. Body.

After the lawsuit's dismissal, the O'Quinn Law Firm went ahead and took over the lead role. On March 3, 2006, the firm filed a motion for leave to substitute in and designate new lead counsel (which was granted) and a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). Funches & Associates withdrew and no longer represents any of the Bailey Petitioners.

The O'Quinn Law Firm also prepared an individual complaint for each Bailey Petitioner pursuant

to CMOs 15 and 15A and attached one such amended complaint to the motion for relief from judgment. The Bailey Petitioners moved for leave to file the amended complaints. App. 12. The amended complaints complied with all outstanding CMOs, including CMOs 15 and 15A. Thus, the Bailey Petitioners were not only ready to re-enter the case and move forward to trial, they had complied with all outstanding CMOs, including those that were the basis of the dismissal.

Even after the district court granted the motion to substitute in and designate new lead counsel, the court's staff still did not properly acknowledge the correct attorneys at the correct address. Indeed, after the Bailey Petitioners perfected their appeal to the Ninth Circuit, the Ninth Circuit Clerk's office contacted the O'Quinn Law Firm and informed it that Catouche Body was designated as the lead counsel for the Bailey Petitioners.

Ultimately, the district court denied the motion for relief from judgment. The Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291, affirmed.

REASONS FOR GRANTING THE PETITION

"[W]here an error of constitutional dimension occurs, a judgment may be vacated as void. One such constitutional error for concluding that a judgment is void for purposes of Rule 60(b)(4) is if the judgment

was entered in violation of due process." *Simer v. Rios*, 661 F.2d 655, 663 (7th Cir. 1981); *see also V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 225 (10th Cir. 1979); *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir. 1949); 11 Charles Alan Wright & Arthur Miller, FEDERAL PRACTICE AND PROCEDURE, § 2872 (1973).

That is precisely what happened here – the judgment was entered in violation of due process. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Especially in light of the fact that a plaintiff's response to CMO 15 dictates whether his or her claim is summarily dismissed, each lead attorney in each case must receive *actual notice* to ensure that the parties' rights are adequately protected. *See United States v. Exxon Corp.*, 773 F.2d 1240, 1301 (Temp. Emer. Ct. App. 1985); *In re Faden*, 170 B.R. 304, 308 (Bankr. S.D. Tex. 1994), *aff'd*, 96 F.3d 792 (5th Cir. 1996). That did not happen here.

Furthermore, this Court has held that "[n]otice by mail or other means *as certain to ensure actual notice* is *a minimal constitutional precondition* to a proceeding which will adversely affect the liberty or property interest of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Mennonite Bd.*

of Missions v. Adams, 462 U.S. 791, 800 (1983) (emphasis added). Here, the name and address of the Bailey Petitioners' true lead counsel were easily ascertainable – a mere phone call would have sufficed.

The Ninth Circuit's opinion does not and could not show compliance with due process. In regard to Federal Rule of Civil Procedure 60(b)(4), the court concluded that "good faith and reasoned efforts" were made to notify the Bailey Petitioners of their obligations under the CMOs and the consequences of not complying. But as the Ninth Circuit itself wrote in a previous case, "[p]arties are entitled to presume that the court will comply with applicable rules of procedure and that they will receive the notice that is usually required." *GMAC Mortgage Corp. v. Salisbury (In re Loloee)*, 241 B.R. 655, 660 (9th Cir. BAP 1999). Here, the "applicable rules of procedure" (e.g., Federal Rule of Civil Procedure 5, the service rule) were not complied with, and the Bailey Petitioners did not receive the required notice.

The Ninth Circuit also observed that the district court had found that counsel "was in fact receiving documents from the court that should have apprised them of the status of the proceedings." The district court's finding does not negate the lack of notice. The "expectation of compliance with rules implies that there is a relation between deviations from required procedures and the nature of the notice that is needed for purposes of due process: the greater the deviation from prescribed procedure, the greater the quality

and amount of notice needed in order to comply with due process." *Loloee*, 241 B.R. at 662. Even if the Bailey Petitioners' counsel were receiving other documents that should have advised them of the status of the case, the receipt of other documents – as opposed to the critical CMOs, the motion to dismiss, and the dismissal order itself – cannot fill the holes in due process. Not providing the CMOs, the motion to dismiss, and the dismissal order is such a significant deviation from "prescribed procedure" that much more than any mere receipt of other documents was necessary to give the heightened "quality and amount of notice needed" to satisfy due process. By analogy to another case featuring a lack of due process, "a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." *Mennonite Bd. of Missions,* 462 U.S. at 800.

The Ninth Circuit also wrote that "[t]here [wa]s nothing to indicate that the *Britton* Plaintiffs or any of their representatives made reasonable efforts to remain apprised of the status of the case." However, as stated above, "[n]otice by mail or other means *as certain to ensure actual notice* is *a minimum constitutional precondition* to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Mennonite Bd. of Missions,* 462 U.S. at 800 (emphasis added). As also stated above, the correct name and address of the Bailey Petitioners' trial counsel were easily ascertainable. Thus, any

alleged failure to use reasonable efforts to stay abreast of the proceedings is irrelevant.

When due process is the issue, neither "good faith and reasoned efforts to notify" nor the receipt of other documents can make up for the lack of crucial, case-determinative documents like those that were missing here. *See Mennonite Bd. of Missions*, 462 U.S. at 800. The difference in what was actually received and what was required to be provided – what "would have been given if the rules of procedure had been followed" – is far too great for a court to correctly rule that the requirement of due process was fulfilled.

The Ninth Circuit's decision has so far departed from the accepted and usual course of judicial proceedings – and sanctioned just such a departure by the district court – as to call for an exercise of this Court's supervisory power. It is not just that more than 80 innocent plaintiffs have had their claims erroneously dismissed from federal court, a forum whose "administration of justice" should be characterized with "regularity and fairness[.]" *Birnbaum v. United States,* 394 U.S. 922, 925 (1969) (Warren, C.J., joined by Douglas, J., dissenting). It is also that scores of other federal PPA plaintiffs face the same inadequate due process standards regarding their claims.

The fact is, courts all over the country have transferred multitudes of PPA-related claims to the MDL proceeding. Literally thousands of plaintiffs are operating under the same threat of improper dismissal that occurred here.

Because of that fact – and because the Ninth Circuit's opinion explicitly blesses a drastic departure from due process by the district court – this Court should intervene. As the Court summarized a decade ago in *LaChance v. Erickson*, 522 U.S. 262, 266 (1998), "[t]he core of due process is the right to notice and a meaningful opportunity to be heard."

CONCLUSION

For the above and foregoing reasons, the Bailey Petitioners respectfully request that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re PHENYLPROPANOLAMINE (PPA), Products Liability Litigation,	No. 06-35508 D.C. No. CV-03-01101-BJR
SANDRA BRITTON; YOLANDA WRIGHT; MARCY ALBERTONI; LINDA ALLEN; MIKE BAILEY; JEROME BEGAY; BENJAMIN BENEMON; JOSIE BLACKWELDER; RICKEY BRANNON; MIKE BRAXTON; LAURA L. BURNS; JACKSON BUTLER, BESSIE CAMPBELL; JAMES CARTER; MICHAEL CLARK; EDWARD COLE; LORETTA COOK; MARY SUE COUCH; NONA DANIELS; GEORGE DEFNALL; MUSA DOH; MARY DOWNING; EDDIE I. ELLISON; JOSEPH ESTER; CARRIE FAVER; JAMES FIELDS; DEBBIE GAYLORD; MAYBELLE GEORGE; MICHAEL HALE; DEBORAL HARRIS; CONSTANCE	MEMORANDUM* (Filed Jan. 18, 2008)

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

HARRISON, individually and as next friend of Savana Harrison, minor; WILLIAM A. HARVILL; GUINDELL D. HOGAN; JOHNNIE HUGGINS; RONALD HYDE; NATHANIEL IVEY; CHRISTINE JACKSON; GLORIA JACKSON; JUDY MARIE JACKSON; ELIZABETH JINKS; GLORIA JOHNSON RUBY JONES; AMERICAN KAYLOR; DEBRA KEITH; MARY LOTT; TERRY MCALMONT; DON MCDANIEL; MARY MCDONALD; WILLIAM MILLER; MARY E. MILLIGAN-NICHOLS; PEGGY LYNN MORRIS; ROY WAYNE MORRIS; NANCY MURRAY; WILLIAM MURTAUGH; ROSIE MAE NORRIS; LINDA ORDONEZ; DANIEL OTIS; ROBERT PATINO; MOISES E. PEREA; DIANA PHARO; DORTHY PILATO; JUNE RHODES; CRAIG RILEY; ALICIA RIVERS; JOE ROBERSON, individually and as representative of the Estate of Vickie Lynn Roberson; ROSA L. ROBERTS, Individually and as Representative of the Estate of Evelyn P. Roberts, Deceased; LINDA GUENTHER, Individually and as Representative of the Estate of Ida Rogue, Deceased;

BETTY C. ROSEMOND; ALMA RUCKER; DANIEL RUSTON; JAMES A. SCALES; CURLEY SHEALEY; LEIGH STRONG; TIRSA VAZQUEZ, Individually and as representative of Alex Vazquez, Deceased; JOHN BAINES WALER; PAMELA WALKER; BENJAMIN WELLS; MAJORIETTE WILLIAMS; CASSIE ELAINE; COVINGTON WILLIAMS; THOMAS WILLIS; DESDA WITCHER; CLIFFORD WOODS; LOIS SUTTON; WILLIE MADISON; CARL POWERS; TONI WALKER; OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

BAYER CORPORATION; GLENBROOK LABORATORIES, a Division of Sterling Drug, Inc.; MEAD & JOHNSON COMPANY; PROCTOR & GAMBLE MANUFACTURING COMPANY; PFIZER INC.; BRISTOL-MYERS SQUIBB COMPANY; APOTHECON INC.; HOGIL PHARMACEUTICAL CORP; SMITHKLINE BEECHAM CORPORATION; CHATTEM, INC.; THOMPSON MEDICAL COMPANY INC.; WYETH; CHESEBROUGHPONDS, INC.;

SCHERING-PLOUGH HEALTH CARE PRODUCTS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

Argued and Submitted January 9, 2008
Seattle, Washington

Before: KLEINFELD, TASHIMA, and TALLMAN, Circuit Judges.

The *Britton* Plaintiffs appeal the district court's order denying their motion for relief from the judgment of dismissal entered two years earlier for failure to comply with case management orders in this multidistrict litigation. The *Britton* Plaintiffs argue that they are entitled to relief under Federal Rules of Civil Procedure 60(b)(4) and 60(b)(6) because they did not have notice of the relevant case management orders, the motion to dismiss, or the order of dismissal. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

"Motions for relief from judgment pursuant to Rule 60(b)[(6)] are addressed to the sound discretion of the district court and will not be reversed absent an abuse of discretion." *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004). A motion brought pursuant to Rule 60(b)(4) on the ground that the district court's order is void is reviewed de novo "because the question of the validity of a judgment is

a legal one." *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1469 (9th Cir. 1995).

A motion for relief from judgment for "any other reason" under Rule 60(b)(6), must be made within a "reasonable time." Fed. R. Civ. P. 60(b), (c)(1); *see Molloy v. Wilson*, 878 F.2d 313, 316 (9th Cir. 1989). "What constitutes a reasonable time 'depends on the facts of each case.'" *United States v. Wyle (In re Pacific Far East Lines, Inc.)*, 889 F.2d 242, 249 (9th Cir. 1989) (quoting *United States v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985)). Relevant to the determination of timeliness are "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981) (per curiam).

The district court held that the *Britton* Plaintiffs' two-year delay before filing a motion for relief was unreasonable and denied the motion as untimely. The district court found that the *Britton* Plaintiffs' "attorney[s] were in fact receiving documents from the court, from defendants, and from plaintiffs' liaison counsel, that should have apprised them of the progress of their case." Even if *Britton* Plaintiffs' counsel did not have notice, the district court found that counsel did not fulfill their obligation to ensure that the court had the correct counsel listing and address and, given the lack of activity in the case, unreasonably failed to monitor the electronic docket. These findings are not clearly erroneous and the district court did not abuse its discretion in finding that,

under these circumstances, the two-year delay in seeking relief from the order of dismissal was unreasonable. *See Armstrong v. Cadle Co.*, 239 F.R.D. 688, 692-93 (S.D. Fla. 2007); *cf. Zurich Am. Ins. Co. v. Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc.)*, 503 F.3d 933, 945-46 (9th Cir. 2007).

"[I]f a judgment is void, a motion to set it aside may be brought at any time." *See Owens-Corning Fiberglas Corp. v. Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.)*, 759 F.2d 1440, 1448 (9th Cir. 1985). "A final judgment is 'void' for purposes of Rule 60(b)(4) only if the court that considered it . . . acted in a manner inconsistent with due process of law." *United States v. Berke*, 170 F.3d 882, 883 (9th Cir. 1999). Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The adequacy of the notice depends upon the factual context in which it is given. *See In re Ctr. Wholesale, Inc.*, 759 F.2d at 1448. Actual notice is not required. *See Jones v. Flowers*, 547 U.S. 220, 226 (2006).

Not only were "good faith and reasoned efforts" made to notify the *Britton* Plaintiffs of their obligations under the case management orders and the consequences of not complying, *see Virtual Vision, Inc. v. Praegitzer Indus., Inc.*, 124 F.3d 1140, 1144 (9th Cir. 1997), but the district court found that counsel was in fact receiving documents from the court that

should have apprised them of the status of the proceedings. There is nothing to indicate that the *Britton* Plaintiffs or any of their representatives made reasonable efforts to remain apprised of the status of the case. Thus notice was constitutionally adequate and the district court did not err in refusing to set aside the order of dismissal. *See id.* at 1145.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION,	MDL NO. 1407 ORDER DENYING PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT
This document relates to: *Britton, et al. v. Bayer Corp., et al., C03-1101*	(Filed May 16, 2006)

This matter comes before the court on plaintiffs' Motion for Relief from Judgment. Having reviewed the briefs and exhibits filed in support of and opposition to this motion, the court finds and rules as follows.

I. BACKGROUND

This matter was originally filed in Mississippi state court and was removed to federal court before being transferred to this MDL on May 29, 2003. On May 7, 2004, the court dismissed the multi-plaintiff complaint for failure to file timely individual complaints in compliance with CMOs 15 and 15A. None of the original 91 plaintiffs filed individual amended complaints, and since May 7, 2004, no activity has taken place in this case until the filing of the instant motion.

II. DISCUSSION

A. Standard

Federal Rule 60(b) authorizes a motion for relief from judgment. That rule provides, in relevant part,

> [o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . any [ ] reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time.[1]

Before evaluating whether a party is entitled to relief on the merits, therefore, the court must first determine whether the motion is timely. Under Fed. R. Civ. P. 60(b), what constitutes a reasonable time is to be measured according to the surrounding circumstances. *Ashford v. Steuart,* 657 F.2d 1053, 1055 (9th Cir. 1981). The court should consider "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Id.* The court should also consider whether plaintiffs had a good

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[1] To the extent that plaintiffs attempt to rely on Fed. R. Civ. P. 60(b)(1), their reliance is misplaced. First of all, a motion for relief from judgment brought under allegation that a party did not receive the order of dismissal is more properly analyzed according to Fed. R. Civ. P. 60(b)(6). *See Molloy v. Wilson,* 878 F.2d 313, 316 (9th Cir. 1989). Second, according to the plain language of the rule, such motion must be made no later than one year after dismissal. Plaintiffs were dismissed May 7, 2004, nearly two years before the filing of this motion. Federal Rule 60(b)(1) is therefore inapplicable.

reason for failing to take the action sooner. *United States v. Holtzman,* 762 F.2d 720, 725 (9th Cir. 1985) (citations omitted).

B. Whether the One-Year Delay Is Reasonable Under Fed. R. Civ. P. 60(b) (6)

Plaintiffs submit that lead counsel did not receive a copy of CMO 15 after the docketing of this case in the MDL. They also claim that counsel did not receive the subsequent motions to dismiss, or a copy of the dismissal order itself, and claim that compliance with CMO 15 was therefore "impossible." They also argue that lack of notice justifies the two-year delay in filing this motion, and render the delay "reasonable" under Fed. R. Civ. P. 60 (b) .

According to plaintiffs, while attorney Delano Funches was and has always been the lead attorney on this case, pleadings were sent by the court to Catouche Body, an attorney once associated with Mr. Funches' firm who was initially responsible for the "day to day filings" of the case. Ex. 1 to Defs.' Response, Delano Funches Dep. at 14, 16. According to plaintiffs, the address listed for Mr. Body on the court's docket is incorrect; moreover, Mr. Body left the Funches law firm in June 2003, approximately half a year after the case was filed and a year before the case was dismissed.

The court finds that despite plaintiffs' counsel's claims that they were not receiving documents from the court - including the dismissal order that began

the tolling of time for purposes of Fed. R. Civ. P. 60(b) - several factors contribute to making a two-year lag between dismissal and the motion for relief from judgment unreasonable. First, the evidence indicates that plaintiffs' attorneys were in fact receiving documents from the court, from defendants, and from plaintiffs' liaison counsel, that should have apprised them of the progress of their case. Lance Palmer, plaintiffs' liaison counsel, has submitted an affidavit averring that he was forwarding court documents on to counsel, including CMOs 15 and 15A. *See* Palmer Decl., Exh. 4 to Defs.' Response. In September 2003, defendants' counsel sent a letter to plaintiffs' counsel, which included a copy of CMO 15, outlining the obligations of that order. Moreover, plaintiffs' counsel are also involved in a number of other PPA cases in this MDL, and certainly had reason to be aware of the dictates of CMOs 15 and 15A, and the consequences of failure to comply; indeed, in this case approximately 65 of the 91 plaintiffs filled out and served their plaintiff fact sheets according to the rules of CMO 6, indicating that at least some of plaintiffs' counsel were receiving communications from the court.

Even assuming, however, that plaintiffs' counsel did not receive copies of either CMO 15 or the order of dismissal, the court finds that the failure to monitor the docket electronically renders the two-year delay in filing this motion categorically unreasonable. As the court has found before, "counsel has 24-hour access to the court's electronic docket and it is the

responsibility of counsel to monitor the case for activity." *Womack v. Bayer Corp.*, C02-2020, Sept. 15, 2004 Order Denying Plaintiffs' Motion for Relief from Judgment, p. 3.[2] Moreover, as this court has found on other occasions, and as the court's electronic filing rules provide, at the very minimum, it is counsel's responsibility to ensure that the court is in possession of the correct names and addresses of counsel on each of their cases. *See* ECF Rule II.C.

Nearly two years have elapsed since this case was dismissed – two years during which, the court is being asked to believe, plaintiffs' counsel made no effort to review the docket. If nothing else, the lack of activity in the case should have put counsel on notice that something was amiss. The court finds counsel's inattention regarding the progress of this case in itself a reason for dismissal for failure to prosecute. To ask the court to take a step even further and reinstate this case, to the prejudice of defendants and to the detriment of the principle of a finality of judgment, asks simply too much.

For the foregoing reasons, the court denies plaintiffs' motion for relief from judgment as untimely. The court also denies plaintiffs' motion to strike defendants' response brief as untimely, as the brief was filed within the 21 days provided by CMO 1. Plaintiffs' motion for leave to file amended complaints is denied as moot.

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[2] The Ninth Circuit affirmed this ruling on March 2, 2006.

DATED at Seattle, Washington this 16th day of May, 2005.

/s/ Barbara J. Rothstein
BARBARA JACOBS
ROTHSTEIN
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION,	MDL NO. 1407
This document relates to the cases listed on Appendices A and B	ORDER OF DISMISSAL WITH PREJUDICE FOR FAILURE TO COMPLY WITH CMO NOS. 15 AND 15A (Filed May 7, 2004)

BEFORE the court are defendants' proposed orders seeking to dismiss various plaintiffs' claims with prejudice against all defendants for failure to file timely individual complaints as required by Case Management Order ("CMO") No. 15. Defendants also request dismissal of a number of multiple plaintiff complaints pursuant to CMO No. 15A.

I. BACKGROUND

A. CMO Nos. 15 and 15A

Many cases transferred into Multidistrict Litigation ("MDL") 1407 by the Judicial Panel on Multidistrict Litigation were brought by groups of plaintiffs against groups of defendants. Plaintiffs in these multiple plaintiff cases failed to state with specificity which products each plaintiff allegedly ingested, and therefore failed to identify which manufacturers

allegedly caused which plaintiff's injuries. On May 29, 2003, the court entered CMO No. 15, Severance of Multiple plaintiff Cases, and ruled that these multiple plaintiff cases did not meet the threshold standard for permissive joinder under Fed. R. Civ. P. 20 (a), CMO No. 15, at 1-2. CMO No. 15, therefore, directed plaintiffs in any multiple plaintiff cases pending in MDL 1407 as of May 29, 2003, excluding those cases alleging loss of consortium on behalf of a spouse, to file and serve new individual for "severed") complaints within 30 days of entry of the order. CMO No. 15, at 2. CMO No. 15 also provided that in cases docketed in MDL 1407 after entry of CMO No. 15, plaintiffs must file and serve new, individual complaints within 30 days of the date of docketing in MDL 1407. CMO No. 15, at 3.

CMO No. 15A was entered on August 26, 2003, and provides that "the original multiple plaintiff Complaints (set forth in Exhibit A attached) shall be dismissed with prejudice as of the effective date of this Order, which includes any plaintiffs for whom a timely filed individual severed Complaint was not filed." CMO No. 15A, at ¶3. An Order of Dismissal with Prejudice Pursuant to CMO 15 and 15A dismissed the original multiple plaintiff complaints listed in Exhibit A to that order.[1] Any additional

[1] The court denies the untimely motion for reconsideration of this order of dismissal. *See* Plaintiffs' Motion for Reconsideration of Order of Dismissal Pursuant to CMO 15 and CMO 15A, filed on December 8, 2003.

multiple plaintiff complaints filed in MDL 1407 are subject to dismissal pursuant to CMO No. 15A as soon as the applicable deadline for filing severed complaints has passed. CMO No. 15A, at ¶3.

B. Defendants' Proposed Orders

In the fall of 2003, defendants informed the court that some plaintiffs who had failed to comply with CMO No. 15 were nevertheless pressing defendants for discovery. The court issued an order on October 30, 2003, reiterating plaintiffs' obligations pursuant to CMO Nos. 15 and 15A. The court directed defendants to submit a proposed order of dismissal listing all cases in which plaintiffs failed to comply with CMO Nos. 15 and 15A. Defendants submitted the two proposed orders which are at issue here.

The initial Proposed Order of Dismissal with Prejudice For Cases in Which Plaintiffs Filed Untimely or No Individual Complaints Under CMOs 15 and 15A, was filed on November 7, 2003 (the "First Proposed Order"). The First Proposed Order seeks dismissal of the claims of plaintiffs whose cases were pending in MDL, 1407 at the time of entry of CMO No. 15. The Second Proposed Order of Dismissal with Prejudice For Cases in Which Plaintiffs Filed Untimely or No Individual Complaints Under CMOs 15 and 15A ("Second Proposed Order") was filed on December 8, 2003, and lists plaintiffs whose severed complaints were due at various points after June 30, 2003, and who failed to comply with CMO Nos. 15

and 15A, The Second Proposed Order also seeks dismissal of a number of multiple plaintiff cases not yet dismissed as contemplated by CMO No. 15A.

The court received and considered a considerable number of briefs from plaintiffs who opposed inclusion in defendants' proposed orders, and also considered defendants' reply briefs in support of the proposed orders. Given the volume of plaintiff oppositions, the court will address the plaintiffs' arguments. Having considered the pleadings, and being filly advised, the court finds and rules as follows:

II. DISCUSSION

A. Dismissal for Failure to Comply with Court Orders

In determining whether to dismiss a claim for failure to comply with, a court order, a district court must consider five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *Pagtalunan v. Galaza,* 291 F.3d 639, 642 (9th Cir. 2002). In the case of plaintiffs who failed to comply with CMO Nos. 15 and 15A, the court is of the opinion that absent special circumstances, dismissal is warranted.

The public's interest in the expeditious resolution of litigation and the court's need to manage its docket

clearly weigh in favor of dismissal. The plaintiffs in multiple plaintiff cases do not state with specificity which products they allegedly ingested, nor do they identify the manufacturers who allegedly caused their injuries. Thus, the practical effect of a failure on the part of these plaintiffs to file severed complaints in a timely fashion is that cases have been prevented from moving forward. Such a lack of diligence does not serve the public interest in expeditious resolution of litigation, nor does it assist the court in managing its docket. *Yourish v. California Amplifier,* 191 F.3d 983, 990-91 (9th Cir. 1999). The failure of plaintiffs to comply with CMO Nos. 15 and 15A has diverted the court's time and resources. Additionally, without the information contained in the severed complaints, defendants are prejudiced, because their ability to defend these cases is seriously compromised. *Pagtalunan,* 291 F.3d at 642-43.

While there is a preference that cases be disposed of on the merits, here, given the failure of some of these plaintiffs to comply with CMO Nos. 15 and 15A, it is impossible to dispose of these cases on that basis. *See, e.g., In re Exxon Valdez,* 102 F.3d 429, 433 (9th Cir 1996) ("policy [of disposing cases on their merits] lends little support to appellants, whose total refusal to provide discovery obstructed resolution of their claims on the merits."). These plaintiffs' unwillingness to file severed complaints, or their serious delay in so doing, is not excusable. Dismissal is warranted,

absent a convincing reason for failure to comply with CMO Nos. 15 and 15A.[2] Therefore, the cases of the plaintiffs listed on Appendix A to this Order are dismissed, with prejudice, against all defendants.[3] CMO No. 15A provides that "after all applicable deadlines set forth in CMO 15 have elapsed, defendant may move for the dismissal of the original multi-plaintiff complaint[.]" CMO No. 15A, at ¶3. Defendants seek dismissal of various multiple plaintiff complaints on this basis. The multiple plaintiff complaints listed on Appendix B to this Order are dismissed pursuant to CMO No. 15A.

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[2] In Section II(B), below, the court addresses the specific arguments made by plaintiffs opposing dismissal pursuant to CMO Nos. 15 and 15A.

[3] Delaco, successor to Thompson Medical Company, filed a petition for bankruptcy in the Southern District of New York on February 12, 2004. Although litigation against Delaco is automatically stayed pursuant to 11 U.S.C. §362(a), the court takes notice of the May 5, 2004 Order under 11 U.S.C. §362(d) and Fed. R. Bankr. P. 4001 Modifying Automatic Stay *Nunc Pro Tunc* to Allow Dismissal of Litigation ("Order Modifying Stay"), by United States Bankruptcy Judge Cornelius Blackshear. The Order Modifying Stay allows for the entry of this order of dismissal in cases involving Delaco. *See* Order Modifying Stay at 2, ¶1 and Exhibit B.

B. Plaintiff Oppositions

1. Plaintiffs who argue that their severed complaints were timely filed

First, a group of seven plaintiffs argue that their severed complaints were in fact timely filed, and that they were wrongly included on defendants' proposed orders. *See* Plaintiffs' Brief in Support of their Opposition to Defendants' (Second) Proposed Order of Dismissal, filed 12-17-03.[4] These plaintiffs' severed complaints were due November 14, 2003. There does not appear to be any dispute that the same were timely served by mail on that date. *See* Fed. R. Civ. P. 5(b)(2)(B) (providing that "[s]ervice by mail is complete on mailing."). Plaintiffs claim that their complaints also were timely filed on November 17, 2003, pursuant to Fed. R. Civ. P. 6(e), which plaintiffs allege added three extra days to serve and file the severed complaints. Likewise, 19 other plaintiffs filed motions for reconsideration asserting that pursuant to Fed. R. Civ. P. 6(e), their severed complaints, due on July 7, 2003, but filed on July 10, 2003, were timely filed. *See* Plaintiff's Motions to Reconsider, filed 11-13-03.[5] The

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[4] This opposition brief was filed on behalf of the following plaintiffs: Annie L. Brown; Lisa Burchfield; Ollie M. Harper; Patricia Lovejoy; Lisa Y. Owens; Betty Powell; and Carolyn Sangster.

[5] These motions were filed on behalf of the following plaintiffs: Oliver Hall; Eleanor Cunningham; Carrie Sails; Sara Williams; Sue Daniel; Samuel Webb; Arthur McKinney; Clyde Ware; Annie Peterson; Johnnie Hill; Jack Spivey; Leslie Dansby;

(Continued on following page)

court deems the severed complaints of these plaintiffs to have been timely filed.

2. Plaintiffs who argue that a very minimal delay is excusable

A group of 10 plaintiffs filed a motion to reconsider, arguing that their severed complaints, which were filed one day after the deadline, should be deemed timely filed. *See* Motion to Reconsider this Court's Decision to Sign the Second Proposed Order of Dismissal, filed December 9, 2003.[6] Another group of plaintiffs seeks the same relief on the grounds that a Federal Express delay caused their severed complaints to arrive one day late. *See* Motion Regarding Order Interpreting Case Management Order 15, filed November 6, 2003.[7] The court

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Girish Patkar; Alan Stockdale; John Pezza; Delores Rosebud; Alfonso Ross; Donald Hovey; and Stacey Young.

[6] This motion was filed on behalf of the following plaintiffs: Linda Archer; Johnnie Banks; Mackie Boykin; Jannie Clark; Jimmie Dampier; Louise Gamble; Clementine Jackson; Georgia Jones; Raymond Sharpe; and Aaron Smith.

[7] This motion was filed on behalf of the following plaintiffs: Irene Adams; Linda Adams; Melissa Ardoin; Angela Ashley; Colin Barrilleaux, Carolyn Bourgeois; Peggy Bourgeois; Joyce Bowden; Dorothy Bradley; Rhoenisa Brock; Suze Buras; James Carter; Alton Chalk; Deborah Charlet; Jeffrey Cheramie; Ivystien Cousin; Janna Craig; Emma Richardson for Elnora Davis; Delores DiMattia; Sherry Doucet; Mable Claiborne; James L. Davis; Georgiana Duplessis; Clara Earl; Nellie Emery; Janie Felder obo Jhibria Felder; Rencer Portenberry; Adeline Foster; Eunice Gambino; Iris Gallano; Cathy George; Daniel Gisevius; Carol Goodlett; Melvin Guerra; Norris Falgout; David Harris; Amon Hebert; Elvira Henry; Lillie Hernandez; Carol

(Continued on following page)

finds that such inconsequential delays did not prejudice defendants, and, therefore, dismissal of these cases is unwarranted.

3. Plaintiffs who argue that their obligation to comply with CMO Nos. 15 and 15A was stayed while the Court considered their motion to reconsider CMO No. 15.

Certain plaintiffs waited to file their severed complaints until 30 days after this court denied their motion to reconsider CMO No. 15. These plaintiffs argue that their obligation to comply with CMO No. 15 was stayed until the court ruled on their motion. *See* Motion to Reconsider This Court's Decision to

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Hickman; Elaine Jackson obo Rachael Griffin; Laura Mason-Jackson; Gloria Jennings; Christina Johnson; Gloria Johnson; Pearl Johnson; Kenneth Johnson obo Robert Johnson; Rebecca Jones; Zerlee Jones; Brenda Keller; Judith Kellum; Lillian Keys; Adrienne Lancelin; Maria Lazo; Patricia LeCompte; Howard Lee; Theresa Lomax; Anita Maddox; Florence Mang obo Henry Mang; Joseph Marion; Ronald Marretta; Addie Martin; Jocelyn Maxwell; Debra Mayer; Edna McDaniel; Alice McKenzie; Stanley McWilliams; Sandra Miley; Jessie Means; Jessie Means obo Myrtle Means; Ida Miller; Duffie Mills; Alphonse Moore; Leon Moore; Sandra Moore; Larry Parker; Vicelea Percy; Billie Reinninger; Carolyn Ross; Debra Sakowski; Evert Probst; Sidney Scott; Doris Spurlock; Catherine Stechman; Connie Stevens; Louis Stevens; Brenda Tate; Ida Triplett; Carolyn Underwood; Paula Williams; Walter Wright; Charlotte Young; and Shirley Zeno.

Sign the Proposed Order of Dismissal with Prejudice filed on November 14, 2003.[8]

The court requested a response from defendants, who note that plaintiffs did not file a motion to reconsider CMO 15 until one day before their severed complaints were due, and posit that the motion for reconsideration was simply an effort to circumvent CMO 15. The court finds that plaintiffs' belief that their obligation to comply with CMO No. 15 was stayed until the court ruled on their motion for reconsideration was at least arguably reasonable. Therefore, dismissal of these cases is unwarranted.[9]

4. Plaintiffs who allege that their failure to comply with CMO Nos. 15 and 15A was due to counsel error

A group of plaintiffs asks to be excused for filing severed complaints a month and a half late. These plaintiffs filed motions to reconsider the dismissal of their severed complaints on the grounds that the late filing was "due only to [plaintiffs'] counsel's oversight

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[8] This motion was filed on behalf of the following plaintiffs: Florence Ingram; Reginald Johnson; Lacie Jones; Sarah Lewis; Brady Needham; Viola Oliver; Bessie Steele; Nathaniel Black; Winnie Blaylock; William Boone; Eddie Bullock; Lorilla Hill; Evelyn Murry obo Bennett Murry; Zula Patterson; Bobbie Quinn; Janice White obo Phillip White; and Jackie Young.

[9] However, the court warns plaintiffs that such self-designed extensions of the court's schedules will not be tolerated in the future.

and mistake[.]" *See* Plaintiffs' Motions to Reconsider the Dismissal of Amended CMO 15 Complaint, filed November 12, 2003.[10] Defendant Bayer opposed most of plaintiffs' motions, arguing that the severed complaints, which were due on June 30, 2003, but were not filed until August 19, 2003, should be dismissed. *See* Defendant Bayer Corporation's Oppositions to Plaintiff's Motion to Accept Amended Complaint Filed Pursuant to CMO 15, filed December 1, 2003. The court received another motion on behalf of two plaintiffs who likewise blame their failure to comply with CMO Nos. 15 and 15A on oversight of counsel. *See* Motion of Plaintiffs Hannah Wimberly and Charles Rodgers for Leave to File Amended Complaints Pursuant to CMO 15 Out of Time, filed December 11, 2003. The court considered opposition from two defendants, and plaintiffs' replies in the Wimberly and Rodgers matters. *See* Defendant Bayer Corporation's Opposition to Plaintiffs' Motion for Leave to File Amended Complaints Pursuant to CMO 15 Out of Time, filed January 7, 2004; Defendant SmithKlineBeecham Corporation d/b/a GlaxoSmith-Kline's Opposition to Plaintiff Wimberly's Motion for Leave to File an Amended Complaint, filed January 14, 2004; Rebuttal of Plaintiffs Hannah Wimberly

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[10] These motions to reconsider were filed on behalf of the following plaintiffs: Elnora Jefferson; Raymond Stewart; James Green, Jr.; Calvin McGriggs; Mary Thompson; Shirley Arrington; Doris Gean Cooper; Roosevelt Harris; Edith and Russell McCook; Barbara and Lorenzo Walker; and Daffney and Jay Miller.

and Charles Rodgers in Support of Their Motion For Leave to File Amended Complaints Out of Time, filed January 8, 2004; and Rebuttal of Plaintiff Hannah-Wimberly in Support of Her Motion For Leave to File Amended Complaint Pursuant to CMO 15 Out of Time, filed January 16, 2004.

The claims of these plaintiffs are dismissed. Oversight of counsel is not a sufficient excuse for a delay in complying with court orders. *See, e.g., Engelson v. Burlington Northern Railroad Co.,* 972 F. 2d 1038, 1044 (1992) (holding that an attorney's mistake did not excuse a party's failure to file within the applicable statute of limitations). It is the responsibility of all attorneys to keep track of deadlines relevant to their clients' cases.

5. Plaintiffs who allege the existence of agreements with defendants permitting late compliance

A group of plaintiffs claim to have had agreements with defendants allowing them to file their severed complaints late. These plaintiffs indicate that they sent a letter to counsel for defendants seeking extra time, and informing defendants that they should respond if they objected to the extensions sought. Plaintiffs allege that they did not receive any objections, and that some defense attorneys agreed by telephone to the extensions sought. *See* Plaintiffs' Opposition to Defendants' Second [Proposed] Order of Dismissal with Prejudice for Cases in Which Plaintiffs

Filed Untimely or No Individual Complaints Under CMOs 15 and 15A, filed December 16, 2003. These plaintiffs also filed a Motion to Accept Filing of Individual Complaints in Above-Specified Related Actions. *See* Motion to Accept Filing of Individual Complaints in Above-Specified Related Actions, filed October 17, 2003.[11] Defendants filed a reply in which they contend that plaintiffs' counsel failed to secure the extensions as alleged. *See* Defendants' Reply to Plaintiffs' Opposition to Defendants' Second [Proposed] Order of Dismissal with Prejudice for Cases in Which Plaintiffs Filed untimely or No Individual Complaints Under CMOs 15 and 15A, filed January 2, 2004.

Another group of plaintiffs makes a vague claim that they had agreements with defendants relieving them of many obligations pursuant to various case management orders. They also argue that the issue of compliance with CMO No. 15 is moot since they filed their severed complaints prior to the filing of defendants' proposed orders, and that dismissal is too harsh a remedy for the late filing of severed complaints. Finally, these plaintiffs allege a violation of their due process rights based on defendants' failure

[11] This opposition and motion were filed on behalf of the following plaintiffs: Bridgett Arrington; Emma Lee Bailey; Lonnie Bivens; Theodore Fleming; Johnny Fulcher; Eta Mae Gooden; Laurie Goodin; Joe Knight obo Linda Knight; Virginia Madison; Remona Mitchell; Percy Pennington; Dianne Rushing; Perry Sansing; Kenneth Smith; Alma Watkins; and Emma Watson obo Benito Brown.

to file a formal motion to dismiss their cases pursuant to CMO No. 15. *See* Plaintiffs' Memorandum in Opposition to Defendants' Proposed Order of Dismissal for Failure to Comply with CMO 15, filed November 13, 2003.[12]

Defendant Wyeth filed a reply on behalf of all defendants, flatly denying that defendants were party to any agreements with plaintiffs that would have relieved plaintiffs of their obligation to file timely CMO No. 15 severed complaints, and opposing plaintiffs'

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[12] This opposition was filed on behalf of the following plaintiffs: Leslie Ackel; Dianne Albert; Reginald Baden; Stephen Barquet; David Bell; Kim Boutte; Pearl Briscoe; Karen Brown; Melinda Brown; Raymond Carto; Jean Castille; Faith Chaussy; Eddison Collins; Edward Comeaux; Stemmie Cooper; Monica Cravinas; Joan Derbigny; Catherine Benjamin; Joyce Ashton; Betty Everidge; Yvette Fox; Creato Gordon; John Green; Lula Hayes; Lisa Henderson; Shirley Howard; Rosa Jackson; Karen James; Hilda Johnson; Kathleen Jones; George Kenny; Janice King; Joanne King; Jerry Bell; Gus Bennett; Brian Holder; Lawrence P. Jackson; Melvin Joseph; Roline Keller; Merrie Lafargue; James McFarland; Virginia Railey; Eugene Wells; Tommy Williams; Hazel Wilson; Sydney Claire Woodall; Debra Simmons; Francis Laporte; Lula Lewis; Edith Lindsey; Bobby Lonzo; Ronald Mack; Sandra Mailhes; Rodney Mayeaux; Rose McCrary; Mary McGary; Evangeline McGee; Anne Monley; Khadihah Muhammed; Eddison Nicholas; Herman Pembrook; Carol Rankins; Cassandra Richardson; Reginald Sanders; Tina Simmons; Ella Mae Spurlock; Carolyn Taylor; Wendell Taylor; Joseph Thomas; Sheri Thompson; Cynthia Touissant; Whitney Tripps; Dorothy Warren; Jackie White; Franklin Wimberly; Rosa Rogers obo Mary Rogers; Harold Winters; White-Shadawn obo Brenda White; Mae Johnson obo Helen Martin; and Aline Ricks obo Estelle Robertson.

additional arguments. *See* Defendants' reply to Plaintiffs' Memorandum in Opposition to Defendants' Proposed Order of Dismissal for Failure to Comply with CMO 15, filed December 1, 2003.

The court finds that these plaintiffs failed to establish the existence of agreements allowing them to file late severed Complaints. Furthermore, the mere fact that plaintiffs may have filed and served severed complaints prior to the filing of defendants' proposed orders does not render the issue of compliance with CMO Nos. 15 and 15A moot, as it does not alleviate the prejudice to defendants. Plaintiffs' contention of a violation of due process is frivolous. Therefore, the claims of these plaintiffs alleging the existence of agreements with counsel permitting late compliance are dismissed.

6. Plaintiffs who argue that they did not comply with CMO Nos. 15 and 15A out of concern that, filing severed complaints would jeopardize motions for remand to state court

A group of 5 plaintiffs have informed the court that they were reluctant to file severed complaints out of a concern that, filing such complaints would waive their arguments made in pending motions for remand to state court that this court lacks jurisdiction over their cases. *See* Memorandum of Law in Support of Plaintiffs' Motion for Relief From and in Opposition to Defendants' Proposed Orders of Dismissal with Prejudice for Cases in Which Plaintiffs

Filed Untimely or No Individual Complaints Under CMOs 15 and 15A, dated January 13, 2004; Motions for Reconsideration dated November 17, 2003; and letter dated October 16, 2003.[13] These plaintiffs contend that they attempted to reach agreements with defendants that they would file severed complaints when and if the court denied their pending motions to remand, but defendants refused to enter into such agreements. Thereafter, plaintiffs filed severed complaints approximately 11 days late. The court rules that because plaintiffs' concerns were reasonable, and the delay relatively brief, dismissal of plaintiffs' cases is unwarranted.

III. CONCLUSION

Accordingly, the cases listed in Appendices A and B are DISMISSED with prejudice against all defendants pursuant to CMO Nos. 15 and 15A.

DATED at Seattle, Washington this 7th day of May, 2004.

s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

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[13] The opposition, motions for reconsideration and letter were filed on behalf of the following plaintiffs: Anderson Washington; Samuel Hawkins; Sherry Gaines; Byron Mabry; and Cherrice Jamison.

Appendix A

Individual Cases Dismissed Pursuant to CMO 15/15A

Ackel- Leslie	C03-3690
Albert- Dianne	C03-3691
Archer- Linda o/b/o Juniker Pigron	C03-3516
Arrington- Bridgette	C03-3420
Arrington- Shirley	C03-3443
Ashton- Joyce	C03-3098
Badon- Reginald	C03-3693
Bailey- Emma	C03-2691
Barquet- Stephen	C03-3702
Bell- David	C03-3096
Bell- Jerry	C03-3076
Benjamin- Catherine	C03-3477
Bennett- Gus, Sr.	C03-3073
Bivins- Lonnie	C03-3912
Black- Nathaniel	C03-2602
Blaylock- Winnie	C03-2583
Bolian- Carol	C03-3095
Boone- William	C03-2584
Boutte- Kim	C03-3692
Briscoe- Pearl	C03-3694
Brown- Karen	C03-3695
Bullock- Eddie	C03-2585
Carto- Raymond	C03-3698
Castille- Jerlean	C03-3699
Chaussy- Faith	C03-3700

Collins- Eddison	C03-3704
Comeaux- Edward	C03-3097
Cooper- Doris Gean	C03-3481
Cravinas- Monica	C03-3706
Derbigny- Joan	C03-3703
Doherty- Margaret o/b/o Louis Doherty	C03-3092
Everidge- Betty	C03-3361
Fleming- Theodore	C03-2696
Fox- Yvette	C03-3714
Fulcher- Johnny	C03-2701
Gooden- Eta Mae	C03-2704
Goodin- Laurie	C03-3266
Gordon- Creato	C03-3709
Green- John	C03-3710
Green- James, Jr.	C03-3442
Harris- Roosevelt	C03-3483
Hayes- Lula	C03-3712
Henderson- Lisa	C03-3713
Hill- Lorilla	C03-2586
Holder- Brian	C03-3066
Howard- Shirley	C03-3362
Ingram- Florence	C03-2604
Jackson- Lawrence P.	C03-3063
Jackson- Rosa	C03-3093
James- Karen	C03-3091
Jefferson- Elnora	C03-3444
Johnson- Christina	C03-2148
Johnson- Gloria	C03-1742
Johnson- Hilda	C03-3363
Johnson- Mae o/b/o Helen Martin	C03-3084

Johnson- Reginald	C03-2600
Jones- Kathleen	C03-3364
Jones- Lacie	C03-2607
Joseph- Melvin	C03-3064
Keller- Roline	C03-3074
Kenny- George	C03-3708
King- Janice	C03-3365
King- Joanne	C03-3366
Knight- Joe o/b/o Linda Knight	C03-2703
Lafargue-Merrie	C03-3068
Laporte- Frances	C03-3085
Lewis- Lula	C03-3357
Lewis- Sarah	C03-2608
Lindsey- Edith	C03-3358
Lonzo- Bobby	C03-3359
Mack- Ronald	C03-3360
Madison- Virginia	C03-2695
Mailhes- Sandra	C03-3087
Maury- Oleta o/b/o Gwendolyn Reed	C03-3456
Mayeaux- Rodney Sr.	C03-3715
McCook- Edith	C03-3455
McCrary- Rose	C03-3716
McFarland- James	C03-3065
McGary- Mary	C03-3718
McGee- Evangeline	C03-3719
McGriggs- Calvin	C03-3428
Miller- Daffney	C03-3480
Mitchell- Remona	C03-3457
Monley- Anne	C03-3720
Muhammad- Khadijah	C03-3083

Murry- Evelyn o/b/o Bennett	C03-2587
Needham- Brady	C03-2599
Nicholas- Eddison	C03-3721
Patterson- Zula	C03-2589
Pembrook- Herman	C03-3722
Pennington- Percy	C03-0851
Quinn- Bobbie	C03-2580
Railey- Virginia	C03-3062
Rankins- Carol Ann	C03-3088
Richardson- Cassandra	C03-3089
Ricks- Aline o/b/o Estelle Robertson	C03-3077
Rogers- Rosa o/b/o Mary Rogers	C03-3081
Rushing- Dianne	C03-2700
Sanders- Reginald	C03-3354
Sansing- Peggy o/b/o John Sansing	C03-3424
Simmons- Debra	C03-3075
Simmons- Tina	C03-3344
Smith- Kenneth	C03-3268
Spurlock- Ella Mae	C03-3345
Steele- Bessie	C03-2601
Stewart- Raymond	C03-3441
Taylor- Carolyn	C03-3351
Taylor- Wendell	C03-3343
Thomas- Joseph	C03-3342
Thompson- Mary	C03-3440
Thompson- Sheri	C03-3353
Toussaint- Cynthia	C03-3347
Tripps- Whitney	C03-3355
Walker- Barbara	C03-3479
Warren- Dorothy	C03-3348

Watkins- Alma	C03-2698
Watson- Emma obo Benita Brown	C03-2705
Wells- Eugene	C03-3069
White- Jackie	C03-3350
White- Phillip	C03-2591
White- Shadawn o/b/o Brenda White	C03-3071
Williams- Tommy	C03-3067
Wilson- Hazel	C03-3070
Wimberly- Franklin	C03-3080
Winters- Harold	C03-3352
Woodall- Sydney Claire	C03-3072
Young- Jackie	C03-2592

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Aidt- Rhonda	C03-2733
Addison- Tawnyna	C03-2713
Ainsworth- Catherine	C03-2717
Bailey- Ozell	C03-2719
Britton- Sandra	C03-1101
Brooks- Mary	C03-2854
Clark- Essie	C03-2760
Clark- Jannie	C03-2863
Cooper- Rose	C03-3163
Davis- Kenneth	C03-2742
Dunn- Nancy	C03-1346
Dyson- Amos	C03-2715

Goodman- Carrie	C03-2492
Gray- James	C03-2724
Green- Cleota	C03-0603
Hicks- John	C03-2486
Jones- Sherry	C03-2725
Kincaid- Mattie	C03-2714
May- A.C.	C03-2483
Owens- Lisa	C03-2716
Pegues- Casey	C03-2477
Reed- Isiah	C03-2495
Robbs- Virginia	C03-0601
Rogers- Margaret	C03-2488
Sims- Quitman	C03-2764
Smith- Rosie	C03-2482
Sykes- Mittie	C03-2710
Thomas- Earline	C03-2718
Thomas- Gwendolyn	C03-0862
Tingle- Marcus	C03-2478
Wheeler- Dorothy	C03-2850
Wheeler- Tyree	C03-2763
White- Ansleum	C03-2489
Whittington- Lowell	C03-2852

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re PHENYLPROPANOLAMINE (PPA), Products Liability Litigation, SANDRA BRITTON; et al., Plaintiffs-Appellants, v. BAYER CORPORATION; et al., Defendants-Appellees.	No. 06-35508 D.C. No. CV-03-01101-BJR Western District of Washington, Seattle ORDER (Filed Feb. 22, 2008)

Before: KLEINFELD, TASHIMA, and TALLMAN, Circuit Judges.

The petitions for rehearing are DENIED.

U.S. Const. amend V.

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Civ. P. 60(b).

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

. . .

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

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(2) (2)

Nos. 07-1466; 07-1467

FILED
JUN 2 6 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

SANDRA BRITTON, *et al.*,

Petitioners,

v.

BAYER CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO BAILEY AND ALBERTONI PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals' application of the due process standard for adequate notice relating to the dismissal of Petitioners' action warrants this Court's rare intervention when: (1) the Court of Appeals correctly stated the due process standard as declared in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); (2) the district court determined that the Petitioners actually received documents from the court, from defendants, and from Plaintiffs' Liaison Counsel, that should have apprised them of the progress of their case; and (3) the Court of Appeals held that notice was constitutionally adequate and the district court did not err in refusing to set aside the order of dismissal?

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are as follows:

Sandra Britton; Yolanda Wright; Marcy Albertoni; Linda Allen; Mike Bailey; Jerome Begay; Benjamin Benemon; Josie Blackwelder; Rickey Brannon; Mike Braxton; Laura L. Burns; Jackson Butler; Bessie Campbell; James Carter; Michael Clark; Edward Cole; Loretta Cook; Mary Sue Couch; Nona Daniels; George Defnall; Musa Doh; Mary Downing; Eddie I. Ellison; Joseph Ester; Carrie J. Faver; James Fields; Debbie Gaylord; Maybelle George; Michael Hale; Deborah Harris; Constance Harrison, Individually And As Next Friend of Savana Harrison, Minor; William A. Harvill; Guindell D. Hogan; Johnnie Huggins; Ronald Hyde; Nathaniel Ivey; Christine Jackson; Gloria Jackson; Judy Marie Jackson; Elizabeth Jinks; Gloria Johnson; Ruby Jones; American Kaylor; Debra Keith; Mary Lott; Terry McAlmont; Don McDaniel; Mary McDonald; William Miller; Mary E. Milligan-Nichols; Peggy Lynn Morris; Roy Wayne Morris; Nancy Murray; William R. Murtaugh; Rosie Mae Norris; Linda Ordonez; Daniel Otis; Robert Patino; Moises E. Perea; Diana Pharo; Dorthy Pilato; June Rhodes; Craig Riley; Alicia Rivers; Joe Roberson, Individually and as Representative of the Estate of Vickie Lynn Roberson, Deceased; Rosa L. Roberts, Individually And As Representative Of The Estate Of Evelyn P. Roberts, Deceased; Linda Guenther, Individually And As Representative of the Estate of Ida Rogue, Deceased; Betty C. Rosemond; Alma Rucker; Daniel Rushton; James A. Scales; Curley

Shealey; Leigh Strong; Tirsa Vazquez, Individually And As Representative Of The Estate of Alex Vazquez, Deceased; John Baines Walker; Pamela Walker; Benjamin Wells; Marjoriette Williams; Cassie Elaine Covington Williams; Thomas Willis; Desda Witcher; Clifford Woods; Lois Sutton; Willie Madison; Carl Powers; Toni Walker; Katherine Hutto; Barry Baxter; Eddie LeClair; Beverly Wilson; Alverta Hills; *Petitioners*.

Wyeth, Chattem, Inc., Hogil Pharmaceuticals Corp., Schering-Plough HealthCare Products, Inc., Chesebrough-Pond's, Inc., Pfizer, Inc. and Warner-Lambert Company, LLC, SmithKline Beecham Corp., The Procter & Gamble Company, Bristol-Myers Squibb Company, *Respondents*.

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

Wyeth, Chattem, Inc., Hogil Pharmaceuticals Corp., Schering-Plough HealthCare Products, Inc., Chesebrough-Pond's, Inc., Pfizer, Inc. and Warner-Lambert Company, LLC, SmithKline Beecham Corp., The Procter & Gamble Company, Bristol-Myers Squibb Company, *Appellees*.[1]

All petitioners here are Appellants below.

---

[1] In the Appellees' Brief in the court below, Defendant-Appellees stated, "Plaintiffs never perfected service on all defendants. To the extent any defendant was not properly served, no defendant waives service by the filing of this Defendant-Appellee Joint Answering Brief."

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Wyeth f/k/a American Home Products Corporation ("AHPC"), on behalf of itself and its unincorporated division Wyeth Consumer Healthcare f/k/a Whitehall-Robins Healthcare (collectively "Wyeth")[2]:

> Respondent Wyeth is a publicly traded company. Wyeth does not have any parent corporations and no publicly held company owns ten percent (10%) or more of its outstanding shares.

Chattem, Inc.:

> Chattem, Inc. has no parent corporation and no publicly held corporation owns 10% or more of Chattem, Inc.'s stock.

Chesebrough-Pond's, Inc.:

> Chesebrough-Pond's Inc. merged with and into Conopco, Inc. on May 7, 2005 ("Conopco"). The parent corporation of Conopco is Unilever United States, Inc. No other company owns 10 percent or more of the stock of Conopco. The ultimate, indirect parent corporations of Conopco are Unilever NV and Unilever PLC, both of which are publicly traded, and no

---

[2] A.H. Robins Company, Incorporated merged into AHPC on August 3, 1998, after which it ceased to exist as a separate entity.

company owns 10 percent or more of the stock of either corporation.

Hogil Pharmaceutical Corporation:

Hogil Pharmaceutical Corporation is a privately held corporation. Hogil Pharmaceutical Corporation does not have any parent corporations and no publicly held company owns 10 percent or more of its outstanding shares.

Pfizer Inc. and Warner-Lambert Company, LLC (incorrectly named in this action as "Pfizer" and"Warner-Lambert Company"):

Pfizer Inc. acquired 100% of Warner-Lambert Company, LLC's stock in June 2000. Pfizer Inc. has no publicly held corporate parents, affiliates and/or subsidiaries.

The Procter & Gamble Company:

The Procter & Gamble Company is a publicly traded company. The Procter & Gamble Company does not have any parent corporations and no publicly held company owns 10 percent or more of its outstanding shares.

Schering-Plough HealthCare Products, Inc.:

Schering-Plough HealthCare Products, Inc. ("SPHC") is a wholly owned subsidiary of Schering-Plough Corporation ("SPC"). SPC

has no parent corporation and no individual or corporation holds more than 10% or more of its stock.

SmithKline Beecham Corporation, Inc. d/b/a GlaxoSmithKline & Block Drug Company:

The parent corporation of SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("GSK") is GlaxoSmithKline Holdings (Americas) Inc. No other company owns 10 percent or more of the stock of GSK. The ultimate, indirect parent corporation of GSK is GlaxoSmithKline plc. GlaxoSmithKline plc is publicly traded, and no company owns 10 percent or more of the stock of GlaxoSmithKline plc.

Bristol-Myers Squibb Company:

Bristol-Myers Squibb Company has no parent corporation. It is a publicly-held corporation, listed on the New York Stock Exchange.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished and is reprinted in the Appendix to the Petition ("Pet. App.") at 1-7.

The opinion of the United States District Court for the District of Washington, denying Plaintiffs' Motion for Relief from Judgment, appears at Pet. App. at 8-13, and is unpublished. The opinion of the United States District Court for the District of Washington, dismissing the action, appears at Pet. App. at 14-35, and is unpublished.

JURISDICTION

The order of the United States Court of Appeals sought to be reviewed was entered on January 18, 2008. (Pet. App. at 1). The petition for rehearing was denied on February 22, 2008. (Pet. App. at 36). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time

of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Civil Procedure 60(b):

Rule 60. Relief from Judgment or Order

. . .

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

INTRODUCTION

Petitioners claim that the district court and Court of Appeals erred in refusing, under Rule 60(b)(4), to set aside the order dismissing their action as void due to a lack of due process. Specifically, Petitioners claim that they did not receive the district court's case management orders, the warnings from the district court that their cases would be dismissed for failure to comply, or the proposed order of dismissal. No reason exists for this Court to grant certiorari because whether or not Petitioners received these documents is an issue of fact, and there is no dispute that the Court of Appeals applied the proper due process standard. Furthermore, the Court of Appeals correctly applied the due process standard to determine that Petitioners received constitutionally adequate notice. Accordingly, certiorari should be denied.

STATEMENT OF THE CASE

Petitioners filed their joint, multi-plaintiff complaint in Mississippi state court in November 2002. At that time, Petitioners were represented by

two separate law firms: (1) Funches & Associates, and (2) the O'Quinn Law Firm. Mr. Catouche Body, a former attorney with Funches & Associates, was initially responsible for the day-to-day filings of the case and signed the Complaint. After removal, Petitioners' case was transferred to the United States District Court for the District of Washington, under an order of the Judicial Panel on Multidistrict Litigation ("MDL 1407"), where it was docketed on May 29, 2003.

The parties in the MDL submitted an agreed-upon Case Management Order ("CMO") 1, which set out basic procedures for MDL 1407. *Allen v. Bayer Corp. (In re: Phenylpropanolamine (PPA) Prods. Liab. Litig.)*, 460 F.3d 1217, 1223 (9th Cir. 2006). This order provided that notice by the MDL Court to Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel of any matter or ruling relating to all actions would be considered notice to all MDL 1407 parties, and that service on Liaison Counsel would constitute service on all plaintiffs' and all defendants' counsel, respectively. *Id.*

A series of subsequent CMOs were entered. These CMOs applied to all PPA actions transferred to MDL 1407, and were posted on the court's public website. *Id.* at 1223-24. To address multi-plaintiff complaints, the MDL Court, with the cooperation of lead counsel for both plaintiffs and defendants, issued CMO 15 on May 29, 2003. (Pet. App. at 14-15). CMO 15 required all plaintiffs in multi-plaintiff cases to file individual, severed complaints within 30 days of its entry or, for subsequently filed cases, within 30 days of the MDL docketing date. (*Id.* at

15). The district court also issued CMO 15A, which supplemented CMO 15 and provided for dismissal with prejudice of all jointly-filed complaints as of the effective date of the order (August 26, 2003). (*Id.*). Lance Palmer, Plaintiffs' Liaison Counsel, forwarded to Petitioners' counsel a copy of CMO 15 and 15A. (*Id.* at 11). Defense counsel also mailed a copy of CMO 15 to Petitioners' counsel. (*Id.*)

On July 31, 2003, the district court held a status conference and expressly advised plaintiffs that it would dismiss cases for failing to comply with CMO 15. *In re: Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d at 1225-26. The court also issued a Minute Order confirming this warning. *Id.* at 1226. This Minute Order was posted on the district court's electronic docketing system and on the court's public website. *Id.* Plaintiffs' Liaison Counsel forwarded a copy of this Minute Order to Petitioners' counsel.

On October 30, 2003, the district court entered an order directing defendants to submit a proposed order of dismissal listing all cases in which plaintiffs filed untimely new individual complaints. (Pet. App. at 16). Plaintiffs' Liaison Counsel forwarded a copy of this order to Petitioners' counsel. In compliance with the district court's order, defense counsel submitted two proposed orders of dismissal. (*Id.*) The first proposed order was e-mailed to Mr. Catouche Body and the second proposed order was served on Mr. Funches at Funches & Associates. Petitioners never opposed those proposed orders.

On May 7, 2004, the district court acted upon the proposed orders, dismissing the *Britton* multi-plaintiff complaint as well as all individual Petitioners because they failed to serve individual amended complaints. (Pet. App. at 14-35). Petitioners did not move for reconsideration of the dismissal, nor did they appeal the order.

On March 3, 2006 – nearly two years after the dismissal – Petitioners filed a Motion for Relief from Judgment. The district court held that the Petitioners' almost two-year delay before filing a motion for relief was unreasonable, and denied the motion as untimely. (Pet. App. at 10-12). The district court also determined that the Petitioners' attorneys were receiving documents from the court, the defendants, and from Plaintiffs' Liaison Counsel that "should have apprised them of the progress of their case." (*Id.* at 11).

Petitioners appealed the district court's decision to the Ninth Circuit Court of Appeals. The Ninth Circuit reviewed *de novo* Petitioners' motion for Rule 60(b)(4) relief on the ground that the district court's order was void. (Pet. App. at 4). The Ninth Circuit determined that "good faith and reasoned efforts" were made to notify the Petitioners of their obligations under the district court's CMOs, that the district court found that Petitioners' counsel actually received documents from the court, and that Petitioners did not make any reasonable effort to remain apprised of the status of their case. (*Id.* at 6-7). Therefore, the Ninth Circuit held that notice was constitutionally adequate and affirmed the district court's refusal to set aside the order of dismissal.

(*Id.* at 7). The Ninth Circuit also observed that the district court did not abuse its discretion in finding that the two-year delay in seeking relief from the order was unreasonable, particularly since "the district court found that counsel did not fulfill their obligation to ensure that the court had the correct counsel listing and address and, given the lack of activity in the case, unreasonably failed to monitor the electronic docket." (*Id.* at 5).

Petitioners subsequently filed petitions for rehearing, which were denied. (Pet. App. at 36).

Petitioners now seek a writ of certiorari from the United States Supreme Court.

REASONS FOR DENYING THE PETITION

This case does not present any reason warranting the Court's review. Petitioners do not claim that the Ninth Circuit entered a decision in conflict with the decision of another United States court of appeals or a state court of last resort. There is also no important question at issue. Rather, the sole question presented by Petitioners is whether they received sufficient notice of certain case management orders, the motion to dismiss, and the order of dismissal that disposed of their lawsuit. (Pet. at i). In other words, Petitioners only claim is that both the district court and the Ninth Circuit were wrong in their application of law. This is neither an appropriate issue for certiorari nor correct as a matter of law. Accordingly, certiorari should be denied.

I. Certiorari Should be Denied Because Whether or Not Petitioners Received Documents is an Issue of Fact, and There is no Dispute that the Court of Appeals Applied the Proper Due Process Standard.

A. Whether or not Petitioners received documents is an issue of fact that does not warrant review.

The primary basis of Petitioners' writ is their claim that because the MDL docket sheet purportedly showed the incorrect attorney and the incorrect address, the lead attorney in the *Britton* case never received CMO 15 or the motion to dismiss, and did not timely receive the dismissal order. (*E.g.*, Pet. at 5-6). Therefore, Petitioners claim, the dismissal order was void due to a lack of due process, and should have been set aside under Rule 60(b)(4).

However, after reviewing the evidence, the district court rejected Petitioners' factual assertions, and determined that Petitioners' attorneys "were in fact receiving documents from the court, from defendants, and from plaintiffs' liaison counsel, that should have apprised them of the progress of their case." (Pet. App. at 11). For example, the district court cited evidence that Petitioners' attorneys were sent the district court's orders, including CMO 15, and a letter, which included a copy of CMO 15, outlining the obligations of that order. (*Id.*) The Ninth Circuit affirmed the district court's finding. (Pet. App. at 6-7) (noting that "the district court

found that counsel was in fact receiving documents from the court that should have apprised them of the status of the proceedings").

This finding is a pure issue of fact that disposes of Petitioners' argument that they never received any documents apprising them of the status of their case, and there is simply no reason to review it. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . .").

Furthermore, this issue of fact applies to this case and this case alone. If, as Petitioners claim, the wrong attorney was listed on the MDL docket sheet along with the address of that attorney's grandmother, this is clearly such an unusual or unique circumstance that any ruling on these facts would be inapplicable to other cases claiming a lack of due process. Moreover, Ninth Circuit Rule 36-3 provides that unpublished decisions of the Ninth Circuit – such as that at issue here – "are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." Therefore, the decision of the Ninth Circuit in this case will have little, if any, effect on

future cases within the Ninth Circuit or any other circuit.[3]

B. Any alleged misapplication of a "properly stated rule of law" does not warrant review.

It is indisputable that the Ninth Circuit properly stated the standard that courts of appeal must follow when determining whether due process was satisfied. Specifically, the Ninth Circuit stated:

> Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

(Pet. App. at 6). Petitioners do not, and cannot, claim that the Ninth Circuit stated the incorrect

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[3] Notably, Petitioners attempt to elevate the importance of this case to overcome the lack of certworthiness by arguing that there are "thousands" of other plaintiffs in MDL 1407 that face the same inadequate due process standards and the same threat of dismissal in the future. (Pet. at 11). As discussed above, however, the facts of this case are novel and unique. Moreover, according to the Judicial Panel of Multidistrict Litigation, there were only 209 cases remaining in the PPA MDL as of September 2007. *See* United States Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation 2007 at 59, available at http://www.jpml.uscourts.gov/General_Info/Statistics/statistics.html. This is hardly the purported "multitudes" or "thousands" of plaintiffs that Petitioners would have this Court believe.

standard for due process. In fact, Petitioners' question presented cites this very same standard. (Pet. at i). Therefore, Petitioners' only possible complaint is that the Ninth Circuit somehow misapplied this standard, which is an issue generally inappropriate for review. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). This is not one of those rare cases sufficient to overcome this general rule because the Ninth Circuit's decision is not in conflict with the decision of another United States court of appeals or a state court of last resort, there is no important question at issue, and this case presents novel and unique facts that are inapplicable to any future case in either the Ninth Circuit or any other circuit.

II. The District Court and the Ninth Circuit Correctly Determined that Petitioners Received Constitutionally Adequate Notice.

Petitioners claim that the Ninth Circuit's decision "so far departed from the accepted and usual course of judicial proceedings – and sanctioned just such a departure by the district court – as to call for an exercise of this Court's supervisory power." (Pet. at 11). This position is unsupportable because the district court correctly evaluated the evidence to determine that the Petitioners' attorneys received documents sufficient to put them on notice as to the status of the proceedings, and the Ninth Circuit correctly applied the due process standard to

determine that Petitioners received constitutionally adequate notice.

A. The evidence establishes that Petitioners received documents from the district court, defendants, and Plaintiffs' Liaison Counsel.

The district court properly determined that Petitioners' attorneys "were in fact receiving documents from the court, from defendants, and from plaintiffs' liaison counsel, that should have apprised them of the progress of their case." (Pet. App. at 11). The Ninth Circuit, holding that constitutionally adequate notice was provided, also noted that the "district court found that counsel was in fact receiving documents from the court that should have apprised them of the status of the proceedings." (Pet. App. at 6-7). This factual finding was correct in light of the evidence presented in this case.

The district court's CMO 1 provided that service was complete upon providing documents affecting all cases to Plaintiffs' Liaison Counsel and Defense Liaison Counsel. Pursuant to that CMO, all CMOs were served upon Petitioners once they were provided to Plaintiffs' Liaison Counsel. Plaintiffs' Liaison Counsel submitted an affidavit stating that he mailed to Mr. Funches, with Funches & Associates, at the correct address, all of the district court's CMOs and orders applicable to all cases. Therefore, Plaintiffs' Liaison Counsel averred that he mailed to Petitioners' counsel: (1) CMO 15 and 15A (which Petitioners claim to have never received),

(2) a Minute Order confirming the district court's warning that it would dismiss cases for failure to comply with CMO 15, and (3) an order directing defendants to submit a proposed order of dismissal listing all cases in which plaintiffs had failed to comply with CMO 15. (*See* Pet. App. at 11). Defense counsel also mailed a letter to Mr. Funches, along with a copy of CMO 15, outlining the obligations of that order. (*See id.*) Finally, the certificate of service for the proposed order of dismissal that included Petitioners' case demonstrated that Mr. Funches was properly served with a copy of that order.

Given all of this evidence, the district court – as affirmed by the Ninth Circuit – properly concluded that Petitioners' counsel received documents "that should have apprised them of the progress of their case." (Pet. App. at 11).

Despite all of these documents that were mailed to Petitioners' counsel, Petitioners ask this Court to believe that the dismissal order was entered in violation of due process because they did not receive actual notice of the "critical CMOs, the motion to dismiss, and the dismissal order itself." (Pet. at 8, 10). Petitioners' sole basis for their argument is that the MDL docket sheet did not show Mr. Delano Funches, but rather, showed Mr. Catouche Body – an associate who worked for Mr. Funches. (*Id.* at 4-5). Thus, Petitioners' claim, Mr. Funches did not receive the relevant documents.

Even if, as Petitioners' claim, the MDL docket sheet listed the wrong attorney and the wrong

address, the evidence established – as properly concluded by the district court – that Petitioners' counsel did receive the appropriate documents. Petitioners' attempt to focus this Court on the docket sheet misrepresents and distorts the pertinent facts. For example, Petitioners assert that because Mr. Funches did not receive CMO 15, they could not comply with the district court's order. (Pet. at 5). However, Petitioners fail to inform this Court that Plaintiffs' Liaison Counsel averred that he mailed to Mr. Funches at the correct address a copy of CMO 15. (*See* Pet. App. at 11). In addition, Petitioners fail to point out that the certificate of service on the second proposed order of dismissal, which included all of the *Britton* plaintiffs, indicates that Mr. Funches was properly served with that document via United States mail on December 8, 2003. Moreover, Petitioners do not explain how a number of petitioners complied with a different CMO by filling out and serving plaintiff fact sheets if they never received any documents from the court. (*See* Pet. App. at 11). Also notably absent from Petitioners' purported recitation of the facts is any explanation of who provided the address and attorney's name that was included on the docket sheet, how Petitioners purportedly learned of the dismissal of their action, and why Petitioners or their counsel failed to make any efforts to remain apprised of their case. (*See* Pet. App. at 7) (noting that "[t]here is nothing to indicate that the *Britton* Plaintiffs or any of their representatives made reasonable efforts to remain apprised of the status of the case").

As properly determined by the district court and affirmed by the Ninth Circuit, Petitioners received documents sufficient to provide notice of the CMOs, the proposed dismissal, and the subsequent dismissal of their action.

B. The Ninth Circuit correctly applied the due process standard to determine that Petitioners received constitutionally adequate notice.

The Ninth Circuit carefully considered and correctly applied this Court's holdings in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Jones v. Flowers*, 547 U.S. 220 (2006). The Ninth Circuit also properly considered prior case law within the circuit, and noted that "[t]he adequacy of notice depends upon the factual context in which it is given." (Pet. App. at 6) (citing *Owens-Corning Fiberglas Corp. v. Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.)*, 759 F.2d 1440, 1448 (9th Cir. 1985)). Under these standards, the Ninth Circuit correctly analyzed the facts as determined by the district court and the evidence, and found that "good faith and reasoned efforts" were "made to notify the *Britton* Plaintiffs of their obligations and their obligations under the case management orders and the consequences of not complying." (Pet. App. at 6). Therefore, the Ninth Circuit held that Petitioners received "constitutionally adequate" notice and the dismissal order was not void under Rule 60(b)(4). (*Id.* at 7).

This Court has declared that notice is constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent. *Mullane*, 339 U.S. at 314; *Jones*, 547 U.S. at 226. As explained above, the evidence establishes that Petitioners were mailed numerous documents, including the district court's orders, warnings from the district court that cases would be dismissed for failure to comply with those orders, and the proposal order of dismissal. Petitioners cannot seriously contend that the mailing of all of these documents to Mr. Funches – at the correct address – did not satisfy due process. *See Mullane*, 339 U.S. at 319 ("the mails today are recognized as an efficient and inexpensive means of communication."); *Hagner v. United States*, 285 U.S. 427, 430 (1932) ("The rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed."). Furthermore, the Ninth Circuit has held that to rebut this presumption, something more than a declaration of non-receipt is required. *See Herndon v. De la Cruz (In re De la Cruz)*, 176 B.R. 19, 22 (B.A.P. 9th Cir. 1994).

Therefore, the Ninth Circuit's finding that "good faith and reasoned efforts" were made to notify the Petitioners of their obligations and the consequences of not complying, Pet. App. at 6, is in accordance with the principles set forth by this Court and other decisions within the Ninth Circuit. In contrast to Petitioners' claim, the Ninth Circuit did not depart from the principles set forth in the

Mullane line of authority or sanction such a departure by the district court.[4]

CONCLUSION

For the above and foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

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[4] Petitioners cite a number of cases that are inapposite. For example, Petitioners rely heavily on *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). In *Mennonite*, the county government initiated proceedings to sell the owner's property for nonpayment of taxes. It posted and published an announcement of the tax sale and mailed notice to the owner. Neither the county nor the owner informed the mortgagee of the pending tax sale, and the property was sold. *Id.* at 794. The court held that notice by publication and mailed notice to the property owner could not be expected to lead to actual notice to the mortgagee, and therefore, the notice was insufficient to meet due process requirements. *Id.* at 799-800. In contrast to *Mennonite*, Petitioners instituted their lawsuit and knew that they had a lawsuit pending. Petitioners were properly mailed copies of all of the district courts CMOs, the district court's warnings that a failure to comply with CMO 15 would result in dismissal, and a copy of the proposed dismissal order. This is simply not a case where no notice was sent to a party who had no knowledge that the underlying action was underway.

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In The

Supreme Court of the United States

SANDRA BRITTON, ET AL.,

Petitioners,

v.

BAYER CORPORATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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ARGUMENT

According to the respondents, evidence that something was sent negates uncontroverted evidence that it was never received, and a court's accurate recitation of a standard will suffice even if the court applied it incorrectly. In what Judge O'Scannlain referred to as the "universe of due process,"[1] those notions are untenable. Due process requires a more logical, more discriminating approach. It has to, because it is "concerned with . . . prejudicial infringement of substantial rights." *North Whittier Heights Citrus Ass'n v. NLRB*, 109 F.2d 76, 85 (9th Cir.), *cert. denied*, 310 U.S. 632 (1940).

In seeking to avoid review, the respondents rely on essentially two arguments: this case presents an issue of fact and so does not merit the Court's attention, and the key documents were transmitted to the Bailey Petitioners' counsel. As will be shown below, neither of those contentions should dissuade the Court from granting the Bailey Petitioners' petition for writ of certiorari and reversing the Ninth Circuit's judgment.

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[1] *United States v. Young*, 458 F.3d 998, 1005 (9th Cir. 2006).

I. THIS CASE DOES NOT INVOLVE AN ISSUE OF FACT, BUT EVEN IF IT DID, THE COURT STILL SHOULD GRANT REVIEW.

The respondents assert that this case involves an issue of fact – "whether or not Petitioners received" the documents at issue. Brief in Opposition at 3; *see* Brief in Opposition at 7-11. However, they fail to cite any evidence that the petitioners actually received the documents. In fact, all of the evidence regarding receipt shows that they did not. Obviously, when the evidence on a particular matter is entirely one-sided, there is no issue of fact.

Furthermore, this Court's rules specifically allow for the granting of a petition for writ of certiorari when the asserted error consists of incorrect fact findings. Sup. Ct. R. 10. To be sure, this Court has said that such petitions will be "rarely" granted, *id.*, but as Webster will attest, "rare" is a relative term. Even a small sampling of this Court's jurisprudence shows numerous instances in which the Court decided very fact-specific, fact-intensive cases.

For example, in *Florida v. Riley,* 488 U.S. 445 (1989), the Court held that aerial observation from a helicopter hovering at 400 feet does not violate any reasonable expectation of privacy (though helicopter observation from a lower altitude might). In *Perry v. Leeke,* 488 U.S. 272 (1989), the Court concluded that the right to counsel was not violated when a judge separated a defendant from his attorney during a 15-minute recess after the defendant's testimony on

direct examination (though a lengthier separation may well have). In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), the Court addressed laws requiring that certain information be furnished to a woman by a physician or his or her assistant, carefully distinguishing laws requiring that such information be furnished by the physician exclusively. And in *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court held that a "release time" program allowing public-school students to receive religious instruction during school hours but specifically off-campus did not violate the Establishment Clause.

Considering such examples, it is no surprise that members of the Court have indicated that sometimes fact-specific cases warrant review. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("The relative question in this case . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful . . . ") (Scalia, J., writing for the majority); *United States v. Gagnon*, 470 U.S. 522, 530, 531 (1985) (Brennan, J., joined by Marshall, J., dissenting) (observing that the case decided by the Court contained "odd facts" and had a "highly fact-specific nature"). As Justice Blackmun observed, "the process of constitutional adjudication itself [ ] is often highly fact specific[.]" *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 550 (1989) (Blackmun, J., joined by Brennan, J., and Marshall, J., concurring in part and dissenting in part).

History disproves the respondents' theory that the Court automatically rejects fact-intensive cases. On the contrary, the window created by Supreme Court Rule 10 is more than wide enough for this case to fit through. The Ninth Circuit's decision strays so far from the core values of due process – in the venerable words of *LaChance v. Erickson*, 522 U.S. 262, 266 (1998), "the right to notice and a meaningful opportunity to be heard" – that even if an issue of fact were involved here, it should not preclude review.

II. THE ATTEMPTS TO PROVIDE NOTICE IN THIS CASE DID NOT SATISFY DUE PROCESS.

A. Sent But Not Received

The respondents' Brief in Opposition features a veritable parade of declarations that the key documents in this case were sent to the Bailey Petitioners:

- "Lance Palmer . . . forwarded to Petitioners' counsel a copy of CMO 15 and 15A. . . ." Brief in Opposition at 5.
- "Defense counsel also mailed a copy of CMO 15 to Petitioners' counsel. . . ." Brief in Opposition at 5.
- "Plaintiffs' Liaison Counsel forwarded a copy of this Minute Order to Petitioners' counsel. . . ." Brief in Opposition at 5.
- "Plaintiffs' Liaison Counsel forwarded a copy of this order to Petitioners' counsel. . . ." Brief in Opposition at 5.

- "The first proposed order was e-mailed to Mr. Catouche Body . . . " Brief in Opposition at 5.
- "[T]he second proposed order was served on Mr. Funches at Funches & Associates. . . ." Brief in Opposition at 5.
- "Petitioners' attorneys were sent the district court's orders. . . ." Brief in Opposition at 8.
- "[A]ll CMOs were served upon Petitioners . . . " Brief in Opposition at 12.
- "Plaintiffs' Liaison Counsel . . . mailed to Mr. Funches . . . all of the district court's CMOs and orders . . . " Brief in Opposition at 12.
- "Plaintiffs' Liaison Counsel . . . mailed to Petitioners' counsel [ ] CMO 15 and 15A. . . ." Brief in Opposition at 12.
- "Defense counsel also mailed the letter to Mr. Funches, along with a copy of CMO 15 . . . " Brief in Opposition at 13.
- "[T]he certificate of service . . . demonstrated that Mr. Funches was properly served with a copy of [CMO 15]. . . ." Brief in Opposition at 13.
- "Plaintiffs' Liaison Counsel . . . mailed to Mr. Funches at the correct address a copy of CMO 15. . . ." Brief in Opposition at 14.

- "[T]he certificate of service . . . indicates that Mr. Funches was properly served with [CMO 15] . . . " Brief in Opposition at 14.
- "Petitioners were mailed numerous documents, including the district court's orders . . . " Brief in Opposition at 16.
- "[T]he mailing of all of these documents to Mr. Funches . . . satisf[ied] due process. . . ." Brief in Opposition at 16.
- "Petitioners were properly mailed copies of all of the district court's CMOs . . . " Brief in Opposition at 17 n.4.

Significantly, however, the number of statements that the Bailey Petitioners actually *received* the key documents – as due process required in this case – is considerably fewer. Even then, most of the respondents' proclamations of receipt are not based on the record, but are instead deftly hidden behind the district court's dubious findings:

- "The district court also determined that the Petitioners' attorneys were receiving documents . . . " Brief in Opposition at 6.
- "[T]he district court found the Petitioners' counsel actually received documents from the court . . . " Brief in Opposition at 6.
- "The district court properly determined that Petitioners' attorneys were in fact

receiving documents from the court . . . " Brief in Opposition at 12.

- "[T]he evidence established – as properly concluded by the district court – that Petitioners' counsel did receive the appropriate documents. . . ." Brief in Opposition at 14.

- "As properly determined by the district court . . . Petitioners received documents sufficient to provide notice of the CMOs . . . " Brief in Opposition at 15.

A review of the record shows that there is certainly evidence of sending, but none whatsoever of receiving. For example, the respondents rely on the affidavit of Plaintiffs' Liaison Counsel Lance Palmer. Brief in Opposition at 12-14. But essentially, Mr. Palmer's affidavit states that he always forwarded CMOs, other orders, and other relevant documents to Catouche Body and Delano Funches. In other words, Mr. Palmer's affidavit shows that he did his job and sent the documents he was supposed to send. But noticeably absent from Mr. Palmer's affidavit is any mention of green cards, fax confirmation sheets, or other any other evidence of actual *receipt*.

Mr. Palmer testified that he stuck to the routine which he was supposed to follow. But his generic affidavit does not and cannot counter the specific testimony of Mr. Funches and Mr. Body, who testified that the relevant CMOs and other orders were not, in fact, received.

Their evidence is uncontroverted; yet the Ninth Circuit dismissed it. Due process demanded that it not. As one court remarked, "surely truth is considered important for due process." *Douglas v. Marino*, 684 F. Supp. 395, 399 (D.N.J. 1988).

B. No Evidence

The rest of the respondents' suggestions regarding receipt are similarly infirm. They say that "Petitioners do not explain how a number of petitioners complied with a different CMO by filling out and serving plaintiff fact sheets if they never received any documents from the court." Brief in Opposition at 14. The Bailey Petitioners have never claimed that they received *no* documents from the court. But the record conclusively shows that they did not receive the most important ones.

The respondents also hint that the Bailey Petitioners could have learned that their case had been dismissed (without notice from the district court) because the information was available on the court's electronic docket via the internet. *See* Brief in Opposition at 14. Under that argument, a court could stop sending out notices altogether (or keep sending them to the wrong address). So much for the "notice" in "notice and a hearing."[2]

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[2] When the Bailey Petitioners' appeal reached the Ninth Circuit, the Ninth Circuit's Clerk contacted the O'Quinn Law Firm and informed them that Catouche Body was *still* designated as

(Continued on following page)

The respondents similarly assert that "proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed." Brief in Opposition at 16 (quoting *Hagner v. United States*, 285 U.S. 427, 430 (1932)). Mail intended for the Bailey Petitioners' counsel but sent to the home of Mr. Body's grandmother was hardly "properly directed." Furthermore, an *irrebuttable* presumption that mail sent is actually received violates due process; only a rebuttable presumption is acceptable. *United States v. Simmons*, 476 F.2d 33, 36-37 (9th Cir. 1973); *United States v. Bowen*, 414 F.2d 1268, 1273 (3d Cir. 1969). The affidavits of Mr. Funches and Mr. Body thoroughly rebut the presumption here.[3]

---

lead counsel and that the error must be corrected. Despite the Bailey Petitioners' best efforts to correct the docket sheet error listing Catouche Body as the lead attorney by removing him and specifying Dana Morris and Christian Steed of the O'Quinn Law Firm as lead attorneys, and despite the fact that the district court granted the petitioners' Motion to Substitute Attorney and Designate Lead Counsel, the district court's docket report still listed Catouche Body as lead attorney to be noticed. Amazingly, the docket report also still listed Mr. Body's grandmother's address as the address for the lead attorney to be noticed.

[3] The respondents say that "the Ninth Circuit has held that to rebut this presumption, something more than a declaration of non-receipt is required" (Brief in Opposition at 16), but never address the Bailey Petitioners' evidence. That evidence offers far more than a mere "declaration of non-receipt." For example, Mr. Funches' affidavit states in relevant part:

(Continued on following page)

The respondents likewise say that "Petitioners or their counsel failed to make any efforts to remain apprised of their case." Brief in Opposition at 14. The respondents do not mention that there were communications between the parties *after the suit had been dismissed* that would lead a reasonable person to believe that the case was still pending. For example, in letters dated May 26, 2004, June 1, 2004, June 15, 2004, and June 23, 2004 – each one after the lawsuit had already been dismissed – the respondents provided information to the Bailey Petitioners as if the case had not been dismissed at all.

The District Court's docket sheet in the Britton case lists Catouche Body as the lead attorney to be noticed. This is incorrect. . . . I have at all times been the lead attorney for the plaintiffs in the Britton case. . . . During that time, I have never spoken with Lance Palmer, Plaintiffs' Liaison Counsel.

A certificate of service was filed on December 8, 2003, separate from but in reference to the Second [Proposed] Order of Dismissal With Prejudice For Cases in Which Plaintiffs Filed Untimely or No Individual Complaints Under CMOs 15 and 15A. Though my name appears on the certificate of service, I never received a copy of Defendants' [Proposed] Order of Dismissal With Prejudice For Cases in Which Plaintiffs Filed Untimely or No Individual Complaints Under CMOs 15 and 15A. In other words, the Britton case was dismissed based on this pleading and a series of orders which I never received. Had I received the CMO and court order, I would have acted in a timely manner so as to be in compliance with any and all mandates of the Court.

Last, the respondents' reliance on *Herndon v. De la Cruz* (*In re De la Cruz*), 176 B.R. 19 (B.A.P. 9th Cir. 1994) (Brief in Opposition at 16), deserves comment because that case highlights the very error that was made here. In *De la Cruz*, "[t]here [wa]s no deprivation of Due Process since [the creditor] had *actual notice* of the Chapter 7 case and had sufficient time to file a complaint to determine dischargeability[.]" *Id.* at 24 (emphasis added). Due process required actual notice here, as well, where the stakes were substantially higher.

In sum: Certainly, there is evidence that the key documents were sent to the Bailey Petitioners. But there is no evidence that the Bailey Petitioners actually received them, and there is abundant, uncontradicted evidence that they did not.

CONCLUSION

Did the Bailey Petitioners receive, as due process requires, "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections" (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)) in regard to the CMOs, the motion to dismiss, and the order of dismissal that terminated their lawsuit? This Court's jurisprudence says no. Because the Ninth Circuit said yes, the Bailey Petitioners respectfully

ask the Court to grant their petition for writ of certiorari.

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PETITION FOR REHEARING

On October 6, 2008, the Court denied the Bailey Petitioners' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *In re Phenylpropanolamine (PPA)*, 2008 WL 163041 (9th Cir. 2008). This petition for rehearing is timely filed under Supreme Court Rule 44(2), which states in relevant part that "[a]ny petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial . . . " For the reasons discussed below, the Bailey Petitioners respectfully ask the Court to grant this petition for rehearing and hear this case.

I. INTRODUCTION

This appeal arose from the district court's denial of the Bailey Petitioners' Federal Rule of Civil Procedure 60(b) motion for relief from judgment. On May 7, 2004, the district court dismissed the Bailey Petitioners' PPA claims for failure to comply with case management orders. On March 3, 2006, the Bailey Petitioners filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b), relying on both Rule 60(b)(4) and Rule 60(b)(6). Rule 60(b) provides:

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

. . .

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). "A motion under Rule 60(b) must be made within a reasonable time – and for reasons

(1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." FED. R. CIV. P. 60(c)(1).

The district court denied the Bailey Petitioners' motion on May 16, 2006. The court held that the delay before filing the motion for Rule 60(b) relief was unreasonable and denied the motion as untimely. *PPA*, 2008 WL 163041 at *1. The Ninth Circuit affirmed. *Id.* at *2.

II. THE EVIDENCE

The Bailey Petitioners' trial counsel never received a copy of the motion to dismiss on which the dismissal of the lawsuit was based. Nor did the Bailey Petitioners' trial counsel timely receive the order dismissing the case for failure to comply with the case management orders. While the order dismissing the lawsuit was entered on May 7, 2004, the Bailey Petitioners' trial counsel did not receive it until well over a year later.

The Bailey Petitioners proved these facts with affidavits and other evidence. On the other hand, the respondents proved that the documents at issue were sent – not that they were received. For example, the respondents served up the affidavit of Plaintiffs' Liaison Counsel Lance Palmer, but Mr. Palmer's affidavit shows only that he sent case management orders, other orders, and other relevant documents to Bailey Petitioners counsel (now former counsel) Catouche Body and Delano Funches. Mr. Palmer's

affidavit stops far short of providing evidence that the Bailey Petitioners actually received the critical documents.

The contrast in proof – in other words, the contrast in sent as opposed to actually received – is highlighted by the respondents' briefing in this Court. They continually stated that the key documents were sent: (1) "Lance Palmer . . . forwarded to Petitioners' counsel a copy of CMO 15 and 15A. . . ."; (2) "Defense counsel also mailed a copy of CMO 15 to Petitioners' counsel. . . ."; (3) "Plaintiffs' Liaison Counsel forwarded a copy of this Minute Order to Petitioners' counsel. . . ."; (4) "Plaintiffs' Liaison Counsel forwarded a copy of this order to Petitioners' counsel. . . ."; (5) "The first proposed order was e-mailed to Mr. Catouche Body . . . "; (6) "[T]he second proposed order was served on Mr. Funches at Funches & Associates. . . . "; (7) "Petitioners' attorneys were sent the district court's orders. . . ."; (8) "[A]ll CMOs were served upon Petitioners . . . "; (9) "Plaintiffs' Liaison Counsel . . . mailed to Mr. Funches . . . all of the district court's CMOs and orders . . . "; (10) "Plaintiffs' Liaison Counsel . . . mailed to Petitioners' counsel [ ] CMO 15 and 15A. . . ."; (11) "Defense counsel also mailed the letter to Mr. Funches, along with a copy of CMO 15 . . . "; (12) "[T]he certificate of service . . . demonstrated that Mr. Funches was properly served with a copy of [CMO 15]. . . ."; (13) "Plaintiffs' Liaison Counsel . . . mailed to Mr. Funches at the correct address a copy of CMO 15. . . ."; (14) "[T]he certificate of service . . . indicates that Mr. Funches was properly

served with [CMO 15] . . . "; (15) "Petitioners were mailed numerous documents, including the district court's orders . . . "; (16) "[T]he mailing of all of these documents to Mr. Funches . . . satisf[ied] due process. . . ."; (17) "Petitioners were properly mailed copies of all of the district court's CMOs . . . " Brief in Opposition at 5, 8, 12, 13, 14, 16, 17 n.4.

Yet the district court concluded that the Bailey Petitioners' "attorney[s] were in fact *receiving* documents from the court, from defendants, and from plaintiffs' liaison counsel . . . " *PPA*, 2008 WL 163041 at *1 (emphasis added). For that reason, the district court held that the Bailey Petitioners' two-year delay before filing a motion for relief was unreasonable and denied the motion as untimely. *Id.*

In large part, the district court made its dispositive determination that the Bailey Petitioners' "attorney[s] were in fact receiving documents" from applying the wrong standard of review. And in large part, the Ninth Circuit affirmed by making the same error. The Bailey Petitioners explain below.

III. THE STANDARD OF REVIEW

The standard of review regarding a Rule 60(b) motion is abuse of discretion. *In re Roxford Foods, Inc.*, 12 F.3d 875, 879 (9th Cir. 1993); *In re Hammer*, 940 F.2d 524, 525 (9th Cir. 1991). While the courts have discretion, their discretion is limited by three policy considerations. *Roxford Foods*, 12 F.3d at 879;

Schwab v. Bullock's Inc., 508 F.2d 353, 355 (9th Cir. 1974).

First, because of Rule 60(b)'s remedial nature, it must be liberally applied. *Roxford Foods*, 12 F.3d at 879; *Schwab*, 508 F.2d at 355. Second, because default judgments are disfavored, cases should be decided on their merits if possible. *Roxford Foods*, 12 F.3d at 879; *Schwab*, 508 F.2d at 355. And third, as long as relief is sought in a timely fashion, any doubt should be resolved in favor of setting aside the default judgment. *Roxford Foods*, 12 F.3d at 879; *Schwab*, 508 F.2d at 355.[1]

Roxford Foods is a good example of how the standard of review should work. In that case, the Rule 60(b) movant contended that, because he was never given notice of the hearing on the opposing party's motion for summary judgment, the resulting declaratory judgment should be vacated. 12 F.3d at 879. The Ninth Circuit readily agreed: "Because no such notice was given, we reverse the district court's contrary holding, and vacate the bankruptcy court's declaratory judgment in so far as it applies to the" movant. *Id.* at 881.

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[1] Obviously, there was no "default judgment" in this case insofar as that term describes a judgment rendered against a party who did not answer the suit or appear for trial. *Roxford Foods* and other cases use the term "default judgment" to refer to a non-merits judgment rendered after a party does not respond to a dispositive motion. *See Roxford Foods*, 12 F.3d at 879.

Numerous district court opinions show that a court, when adjudicating a Rule 60(b) issue, is to "resolv[e] all doubts in favor of the party seeking relief." *See, e.g., Satterlee v. Allen Press, Inc.*, 455 F. Supp.2d 1236, 1242 (D. Kan. 2006), *aff'd*, 274 Fed. Appx. 642 (10th Cir. 2008); *MacArthur v. San Juan County*, 405 F. Supp.2d 1302, 1306 (D. Utah 2005); *Fernandes v. United States*, 169 F.R.D. 372, 374 (D. Kan. 1996). Correspondingly, when a court determines a Rule 60(b) issue, it should not ignore uncontradicted evidence. *See Hunter v. Brooks*, 127 F.R.D. 115, 116 (D. Md. 1989); *Update Art, Inc. v. Maariv Israel Newspaper, Inc.*, 635 F. Supp. 228, 230 (S.D.N.Y. 1986); *Swift Chem. Co. v. Usamex Fertilizers, Inc.*, 490 F. Supp. 1343, 1350 (E.D. La. 1980); *Rainwater v. Mailas*, 42 F.3d 1386, *3 (4th Cir. 1994). In a number of opinions, circuit courts have approved and utilized these principles. *See, e.g., United States v. Baus*, 834 F.2d 1114, 1121 (1st Cir. 1987) ("The standard of review for denial of a Rule 60(b)(6) motion is simply stated. 'For the purpose of this opinion, we take the facts to be as the [guarantors] allege, for all we are to do on this appeal is determine whether those allegations, if proved, would justify relief.'") (quoting *United States v. Cirami*, 563 F.2d 26, 28 (2d Cir. 1977)).

Resolving all doubts in favor of the Rule 60(b) movant and crediting the movant's uncontradicted evidence is consistent with the purpose of the rule. "The purpose of Rule 60(b) is to delineate the circumstances under which relief may be obtained from the

operation of final judgments, whether they are entered by default [ ] or otherwise." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981) (citation omitted). And "[t]he purpose of incorporating a residual clause, such as 60(b)(6), in a rule is to provide for unusual and exceptional circumstances that the drafters of the rule did not anticipate." Deborah Roy, *The Sixth Circuit's Unprecedented Reopening of Demjanjuk v. Petrovsky*, 42 Clev. St. L. Rev. 737, 749-50 (1994).

"By its very nature, [Rule 60(b)] seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts.'" *Seven Elves*, 635 F.2d at 401 (quoting *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970)). Thus, "[i]t is often said that the rule should be liberally construed in order to do substantial justice." *Seven Elves*, 635 F.2d at 401 (citing *Greater Baton Rouge Golf Ass'n v. Recreation & Park Comm'n*, 507 F.2d 227, 228-29 (5th Cir. 1975); *Laguna Royalty Co. v. Marsh*, 350 F.2d 817, 823 (5th Cir. 1965); *In re Casco Chem. Co.*, 335 F.2d 645, 651 n.18 (5th Cir. 1964); *Serio v. Badger Mut. Ins. Co.*, 266 F.2d 418, 421 (5th Cir.), *cert. denied*, 361 U.S. 832 (1959)). "What is meant by this general statement is that, although the desideratum of finality is an important goal, *the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the particular case in*

order that the judgment might reflect the true merits of the cause." *Seven Elves*, 635 F.2d at 401 (emphasis added) (citing *Brothers, Inc. v. W. E. Grace Mfg. Co.*, 320 F.2d 594, 610 (5th Cir. 1963); *Serio*, 266 F.2d at 421).

IV. THE COURTS' ERRORS

The district court's decision, and the Ninth Circuit's affirmance, violate the above principles. The district court, rather than crediting the uncontradicted evidence of no receipt, concluded that the Bailey Petitioners' "attorney[s] were in fact receiving documents from the court, from defendants, and from plaintiffs' liaison counsel . . . " *PPA*, 2008 WL 163041 at *1. All doubts were not "resolv[ed] . . . in favor of the party seeking relief," and both courts thereby erred. Had they followed the correct standard of review, they would have concluded that the Bailey Petitioners' Rule 60(b) motion was made within a reasonable time and was therefore timely. Had they followed the correct standard of review, they also would have necessarily found that the Bailey Petitioners proved their ground of no receipt and were entitled to Rule 60(b) relief.[2]

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[2] The Ninth Circuit wrote that, "Even if [the Bailey Petitioners'] counsel did not have notice, the district court found that counsel did not fulfill their obligation to ensure that the court had the correct counsel listing and address and, given the lack of activity in the case, unreasonably failed to monitor the electronic docket. . . . There is nothing to indicate that the

(Continued on following page)

V. THE COURT SHOULD GRANT REVIEW.

Rule 60(b)(6) is the "catchall provision." *Davis v. Kansas Dep't of Corrections*, 507 F.3d 1246, 1249 (10th Cir. 2007); *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005), *cert. denied*, 546 U.S. 1090 (2006). It has been described as "a grand reservoir of equitable power to do justice in a particular case[.]" 7 J. Lucas & J. Moore, Moore's Federal Practice ¶ 60.27[2] (2d ed. 1982).

"The most common 'other reason' for which courts have granted relief" under Rule 60(b)(6) "is when the losing party fails to receive notice of the entry of judgment in time to file an appeal." 11 Charles Alan Wright et al., Federal Practice & Procedure § 2864 (2d ed. 1995). That is precisely what happened here. But under the Ninth Circuit's approach, justice moves from the "grand reservoir" in a trickle. Under that standard, courts have the power to ignore uncontradicted evidence that favors the Rule 60(b)(6)

[Bailey Petitioners] or any of their representatives made reasonable efforts to remain apprised of the status of the case." *PPA*, 2008 WL 163041 at *1-2. Even if these conclusions were correct, they put the burden on the Bailey Petitioners, where it does not belong. "Notice by mail or other means *as certain to ensure actual notice* is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (emphasis added). It is undisputed that the correct name and address of the Bailey Petitioners' trial counsel were reasonably ascertainable.

movant and resolve all doubts *against* the movant, not for it – even where there really *is no* doubt.

The Bailey Petitioners ask the Court not to let this erroneous method of determining Rule 60(b) issues stand. They respectfully request that the Court grant their petition for rehearing and hear this case.

Respectfully submitted,

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GOOD FAITH CERTIFICATION OF COUNSEL

Pursuant to United States Supreme Court Rule 44(2), I hereby certify that (1) this Petition for Rehearing is presented in good faith and not for delay, and (2) this Petition for Rehearing is restricted to the grounds specified in Rule 44(2). Specifically, this Petition for Rehearing is restricted to "other substantial grounds not previously presented."

Signed this 31st day of October, 2008.

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